Supreme Court, U. S.
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No. 80-169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.

Petitioner,

v.

WILLIAM MITCHELL

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

When an employee's discharge has been upheld in "final and binding" arbitration and the employee seeks to relitigate his discharge with his employer in the federal courts under § 301 of the **Labor Management Relations Act** on the ground that the union failed him in its duty of fair representation, did not the court below err in determining that the suit was governed by the six-year statute of limitations for actions on contracts and, therefore, was not barred by the ninety-day limitation on actions to vacate arbitration awards?

PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were United Parcel Service, Inc. (petitioner in this Court), William Mitchell (respondent in this Court), and Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (co-appellee with petitioner in the court of appeals).

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No.

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OCTOBER TERM 1980

UNITED PARCEL SERVICE, INC.

Petitioner,

v.

WILLIAM MITCHELL

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Parcel Service, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 3, 1980.

OPINIONS BELOW

Neither the opinion of the United States District Court for the Eastern District of New York (A1) [1] nor the

1. References herein to "A" pages are to pages in the appendix to this petition.

opinion of the United States Court of Appeals for the Second Circuit (A5), reversing the opinion of the district court, has been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1980. (A14) United Parcel Service filed a timely petition for rehearing which was denied on May 7, 1980. (A16-A17)

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the **Labor Management Relations Act of 1947,** 29 U. S. C. § 185(a), provides in pertinent part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 12 of the **United States Arbitration Act,** 9 U. S. C. § 12, provides in pertinent part as follows:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

Section 7511(a) of the **New York Civil Practice Laws and Rules,** N. Y. Civ. Prac. Law § 7511(a) (McKinney), provides as follows:

> When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 213 of the **New York Civil Practice Laws and Rules,** N. Y. Civ. Prac. Law § 213 (McKinney) provides in pertinent part as follows:

> The following actions must be commenced within six years: . . .
>
> (2) An action upon a contractual obligation of liability express or implied, except as provided in Article 2 of the Uniform Commercial Code . . .

STATEMENT OF THE CASE

Respondent William Mitchell was employed by petitioner United Parcel Service, Inc. ("UPS") as a car washer at its Staten Island, New York facility. He was discharged by UPS on January 13, 1977 for falsifying his time cards and claiming payment for hours which he did not work.

Mitchell, a member of the Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (the "Union"), denied the charges against him and requested the Union to file a grievance against UPS on his behalf contesting the discharge. UPS and the Union are parties to a collective bargaining agreement which governs the bases upon which employment may be terminated and contains a grievance and arbitration procedure for the resolution of disputes covered by the agreement.

Pursuant to the collective bargaining agreement, Mitchell's grievance was submitted to a panel of the Joint Atlantic Area Parcel Grievance Committee (the "Joint Panel"). Mitchell was represented by the Union at a full hearing on the grievance before the Joint Panel.

On February 16, 1977, the Joint Panel issued an award holding that UPS had not violated the agreement by discharging Mitchell and denied the grievance. Under the terms of the collective bargaining agreement, the decision of the Joint Panel upholding the discharge is final and binding.

Seventeen months after the Joint Panel sustained the discharge, Mitchell instituted this suit pursuant to § 301(a) of the **Labor Management Relations Act of 1947**, 29 U. S. C. § 185(a) and **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976). The complaint alleged that UPS had discharged Mitchell in violation of the collective bar-

gaining agreement and that the Union had failed to represent him fairly in the grievance and arbitration process.

Under **Hines,** an employee may relitigate a contested discharge sustained by an arbitration decision only if he asserts both that the discharge was contrary to the collective bargaining agreement and that the union's breach of its duty of fair representation subverted the arbitration process.

The Decision of the District Court

The defendants moved for summary judgment in Mitchell's suit on the ground that the action was barred by the ninety-day statute of limitations for actions to vacate arbitration awards. N. Y. Civ. Prac. Law § 7511(a) (McKinney). Mitchell argued that the statute of limitations governing actions to vacate arbitration awards was not appropriate because the arbitration process was rendered ineffective by the union's misconduct.

The district court granted the defendants' motion for summary judgment and dismissed the complaint. It agreed that an action seeking reinstatement and damages following an adverse arbitration decision is properly characterized as a suit to vacate an arbitration award. The court reasoned that the relief sought had been denied in an award "issued as a result of a full-scale arbitration proceeding" and the effect of any judicial relief "would be to vacate the determination of the arbitrators."

The district court rejected the argument that the ninety-day statute of limitations was "too short" in view of the fact that the federal **Arbitration Act,** 9 U. S. C. § 12, likewise provides a three-month statute of limitations. It reasoned that the application of the ninety-day statute of limitations was consistent with the federal labor policy favoring relatively rapid resolution of labor disputes through final and binding arbitration.

The Decision of the Court of Appeals

On appeal, the court of appeals rejected the district court's characterization of the action as a suit to vacate an arbitration award. It held the ninety-day statute of limitations inapplicable to § 301 actions brought pursuant to **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 544 (1976), which permits a discharged employee to bring a § 301 action despite an adverse arbitration award where the union had breached its duty of fair representation in presenting the employee's grievance to the arbitrator. Rather, the court of appeals held that in such cases the six-year statute of limitations for contractual breaches, N. Y. Civ. Prac. Law § 213(2) (McKinney), was applicable. The court of appeals therefore reversed the district court's dismissal of the action.

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below Rejecting the Limitation Period for Suits to Vacate Arbitration Awards in Favor of a Longer Period Raises an Important Question of Federal Labor Law and Threatens the Future Effectiveness of Arbitration as a Means of Resolving Labor Disputes.

In reversing the district court's dismissal of Mitchell's action and holding that the limitation period was six years rather than ninety days, the court of appeals has contributed to a growing conflict among the lower federal courts as to the appropriate limitation period governing the timeliness of § 301 actions brought pursuant to **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 544 (1976).

The present unsettled state of the law has shaken the confidence of both employers and unions in the finality of arbitration awards,[2] and the prospect of arbitration awards remaining open for six years threatens to undermine the private dispute settlement machinery provided by collective bargaining agreements. Although there is not yet a conflict among the circuits, this extremely important issue of the appropriate statute of limitations for actions commenced pursuant to **Hines** should be resolved as soon as possible to insure continued reliance on arbitration by employers and unions in accordance with federal labor policy.

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2. A petition for writ of certiorari to the United States Court of Appeals for the Second Circuit on this question recently has been filed by the United Steelworkers of America to review the judgment in **Flowers v. Local 2602, United Steelworkers**, 2d Cir., — F. 2d —, (No. 80-7020) (March 24, 1980), *petition for cert. filed*, No. 80-26.

A. The Decision Threatens Federal Labor Policy.

Congress has placed its stamp of approval on contractual arrangements to resolve labor disputes [3] and this Court has affirmed the importance of arbitration as "a stabilizing influence" necessary to effectuate industrial self-government and labor peace.[4] Parties to collective agreements rely on the finality of arbitration as protection from litigation of labor disputes.

The bar to the finality of arbitration is lifted only when the process culminating in an arbitration award is fatally flawed, such as where the union's bad faith representation of the employee subverts the arbitration process. **Hines**, 424 U. S. at 571-572.

These limitations on the finality of arbitration awards increase the willingness of employers, employees, and unions to rely on arbitration because they provide a guarantee that arbitration, while "binding and final" and not subject to reexamination through appeals or separate lawsuits, nevertheless will satisfy the purposes for which the parties adopted it. So long as challenges to arbitration must be promptly brought, these limitations do not undermine the strong federal policy favoring arbitration as a means of resolving labor disputes.

By contrast, a six-year statute of limitations on actions which, however the court of appeals may characterize them, permit relitigation of matters which had

3. Section 203(d) of the **Labor Management Relations Act, 1947**, 29 U. S. C. § 173(d) (1978) states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . ."

4. *See, e.g.*, **Steelworkers v. American Mfg. Co.**, 363 U. S. 564, 566 (1960); **Steelworkers v. Warrior & Gulf Co.**, 363 U. S. 574, 580, 581 (1960); **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554, 571 (1976).

been resolved by arbitration, takes away the principal benefits of arbitration as a means of resolving labor disputes—speed, economy, and fairness.

The loss of speed and economy is patent. Under the court of appeals' decision, simply by alleging the absence of fair representation, an employee can impose on employer and union alike the cost of extensive litigation years after both believe the issue has been finally resolved. The application of a six-year limitation period to **Hines** actions will undermine the stability of the private settlement machinery and increase the possibility of industrial strife. If arbitration awards remain open to relitigation for six years, parties to the labor contract will be unsure as to the meaning of its terms. Contract negotiations will become more difficult if the correct interpretation of existing agreements remains unclear. Grievances that are not finally resolved for six years may create industrial unrest, and disaffected employees have more time to bring suit to harass both employer and union. On a more practical, every day level, every time the employer wins an arbitration, neither the union nor the company can safely destroy its files for six years; the union must remain prepared to prove that it fairly represented its member, and the company that its actions which led to the arbitration were proper.

Most important, the decision of the court of appeals takes a substantial element of fairness out of the arbitration of grievances. If the employer loses the arbitration, it has ninety days to challenge the award. By contrast, if it prevails in the arbitration, it must be prepared to relitigate the issue for six years. For the employee, the decision is final after three months unless he chooses to attack it; for the employer it remains subject to attack for six years.

The absence of arbitral finality will place a severe strain on management-union relations. The myriad dis-

putes which the parties have in the past been able to resolve in arbitration expeditiously and finally will now be suspended in limbo for six years while aggrieved employees decide whether to challenge the award in court.[5] Such arbitrations are not limited to relatively simple discharge claims. They may involve a class of grievants, and the results may directly affect the employment or seniority status of hundreds, and perhaps thousands, of employees. Under the court of appeals' decision, management and the union will no longer be able to obtain an expeditious and final resolution of such disputes.

Since, under this decision, arbitration will henceforth retain its quality of expeditious finality only when the employer loses, it is reasonable to expect that many employers will abandon or sharply curtail labor arbitration as a means of resolving disputes. As a result, labor disputes that traditionally have been decided by arbitration will increasingly be fought out in the streets, through strikes and other work disruptions, and in the courts.[6]

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5. For example, in this case plaintiff Mitchell was discharged on January 13, 1977 and the discharge was affirmed by the arbitration panel on February 16, 1977. Under the Panel's decision, the merits of that discharge would be open to challenge until February 16, 1983.

6. This petition has been written on the assumption that the same statute of limitations applies to § 301 **Hines** suits whether the defendant is the employer or the union. In fact, there are strong reasons to apply to the employer the state statute of limitations governing suits to vacate arbitration awards, even if the same statute does not apply to the union. After all, it is the union's failure of fair representation and not the employer's which removes the finality from the arbitration award. The union should be aware of the conduct which constitutes failure of fair representation; the employer cannot be.

Moreover, as this case illustrates, the two claims have entirely different bases and arose at different times: the claim against the

B. The Court of Appeals Misread This Court's Hines Decision.

The court of appeals relied heavily on this Court's decision in **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976), in rejecting the district court's characterization of § 301 suits following arbitration awards as actions to vacate those awards, to which the New York statute of limitations for such actions must be applied. This Court gave every indication in **Hines**, however, that the district court's characterization was proper. This Court in **Hines** did not describe the issue before it as dependent upon the underlying contractual protections against wrongful discharge. Instead, the majority opinion, as well as the concurring and the dissenting opinions, all described the issue as one of determining the conditions under which the finality provisions of the arbitration provisions of the collective bargaining agreement must be enforced. 424 U. S. at 560-61, 567, 571, 572 (concurring opinion of Mr. Justice Stewart); 575 (dissenting opinion of Mr. Justice Rehnquist). The issue, then, is whether and under what conditions the arbitration agreement will be enforced, and not whether the courts will enforce contractual provisions against wrongful discharge.

Similarly, in **Humphrey v. Moore**, 375 U. S. 335 (1964), on which **Hines** was partly based, this Court phrased the issue as "whether the Kentucky Court of Appeals properly enjoined implementation of the decision of

6. (Cont'd.)

employer arose out of an alleged wrongful discharge which occurred at some time before the arbitration, whereas the claim against the union did not arise out of the discharge itself, but rather out of the alleged failure of the union, at some later date, adequately to represent the employee in the arbitration proceedings in which he grieved the earlier claim against the employer.

a joint employer-employee committee purporting to settle certain grievances . . . ." 375 U. S. at 336. Thus, the decision of the court of appeals, like the similar decision of the Court of Appeals for the Sixth Circuit in **Smart v. Ellis Trucking Co.**, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979), reflects a misreading of this Court's decision in **Hines** which threatens widespread damage to labor-management relations.

Indeed, logically the case must be viewed as most analogous to an action to vacate an arbitration award, in order to avoid the conflicting burdens that would otherwise be imposed on an employer. Of course if the decision reached in the subsequent § 301 action is the same as that reached by the arbitrators, the employer's duties are clear; but if a contrary order is issued, and the arbitral decision remains outstanding on the theory that the § 301 action was not brought to vacate it, an employer could legitimately complain that he is faced with conflicting legal rights and responsibilities.

C. The Lower Courts Are in Conflict and Confusion.

The issue of the appropriate state limitation period governing the timeliness of a § 301 action brought pursuant to **Hines** has arisen frequently since the case was decided, but it has not been resolved by this Court.[7]

In characterizing Mitchell's suit as a contract action rather than as an action to vacate an award, the court below disagreed with the New York federal court decisions holding the shorter statute of limitations applicable

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7. **International Union, United Auto Workers v. Hoosier Cardinal Corp.**, 383 U. S. 696, 704-705 (1965) holds only that ". . . since no federal provision governs, . . . the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations."

to **Hines** actions.[8] Numerous courts in other jurisdictions also have applied relatively short statutes of limitations governing suits to vacate arbitration awards.[9]

The only other court of appeals to consider the timeliness of a **Hines** action, the Sixth Circuit, rejected the shorter limitation period for actions to vacate an award in favor of a three year period for personal injury suits in **Smart v. Ellis Trucking Co.**, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979). The Second and the Sixth Circuit decisions thus seek to avoid the inevitable consequence of the policy that actions to overturn awards must be taken expeditiously.

The existence in forty-two states of a statute of limitations for actions to vacate awards,[10] coupled with the cur-

8. *See, e.g.*, **Baker v. R. H. Macy & Co.**, 77 C 912 (E. D. N. Y. Jan. 19, 1978); **Barbarino v. Anchor Motor Freight, Inc.**, 421 F. Supp. 1003, 1006 (W. D. N. Y. 1976); *see also*, **Hanna Heating & A. C. Co. v. Sheet Metal Workers, Local Union No. 38**, 378 F. Supp. 1001, 1003 (S. D. N. Y. 1974).

9. *See, e.g.*, **Pizzuto v. Hall's Motor Transit Co.**, 409 F. Supp. 427 (E. D. Va. 1976) (Federal Arbitration Act's three-month limitation); **DeLorto v. United Parcel Service, Inc.**, 401 F. Supp. 408 (D. Mass. 1975) (Massachusetts' thirty-day limitation); **Lunceford v. Western Conference of Teamsters**, 87 LRRM 2011 (C. D. Cal. 1974) (California's 100-day limitation); **Elrod v. Western Conference of Teamsters**, 77 LRRM 2619 (C. D. Cal. 1971), *aff'd on other grounds* 85 LRRM 2189 (9th Cir. 1973), *cert. denied*, 416 U. S. 955 (1974) (California's 100-day limitation); **Howerton v. J. Christenson Co.**, 76 LRRM 2937 (N. D. Cal. 1971) (California's 100-day limitation). *See also*, **Local 800 v. Lakeshore Motor Freight Co.**, 102 LRRM 2046 (W. D. Pa. 1979) (Pennsylvania's three-month limitation); **UMW v. Jones & Laughlin Steel Corp.**, 378 F. Supp. 1206 (W. D. Pa. 1974) (Pennsylvania's three-month limitation); **Teamsters Local 249 v. Motor Freight Express, Inc.**, 356 F. Supp. 724 (W. D. Pa. 1973) (Pennsylvania's three-month limitation).

10. These statutes are collected in Appendix F to the petition for certiorari in **United Steelworkers v. Flowers**, No. 80-26 (U. S., filed July 7, 1980), which for the convenience of the Court, the

rent conflict among the lower federal courts, indicates the frequency with which this issue will continue to arise and the urgency of its prompt resolution.

CONCLUSION

For the reasons set forth above, we respectfully urge that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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Of Counsel.

Dated: August 5, 1980

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10. (Cont'd.)
United Steelworkers has granted permission to be reprinted in the Appendix to this petition at p. A18. Suits to vacate awards under the **United States Arbitration Act**, 9 U. S. C. § 12, also must be brought within three months.

Appendix

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1547

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

SIFTON, *District Judge.*

Pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185, plaintiff, William Mitchell, instituted this action against his former employer and his union alleging wrongful discharge and inadequate representation. The suit was commenced over a year after a joint arbitration panel, convened in accordance with the collective bargaining agreement between defendants, issued an award sustaining Mitchell's discharge for allegedly falsifying his time cards. Mitchell seeks reinstatement and damages primarily on the ground that he was inadequately represented by his union before the joint grievance committee.

This case bears great resemblance to *Wallace v. AT&T*, 460 F. Supp. 755 (E. D. N. Y. 1978), in which

this Court dismissed a similar complaint as time barred under CPLR 7511(a). In *Wallace*, this Court determined that a suit seeking reinstatement and damages for allegedly wrongful discharge pursuant to an arbitration award is appropriately characterized as a suit to vacate the award and is, therefore, subject to the 90-day limitation period provided in the State's statute. Further, this Court held that in view of the inter-relationship between a Section 301 claim against an employer and an unfair representation claim against a union—both stemming from the allegedly wrongful discharge of an employee contrary to the terms of the collective bargaining agreement—both the unfair representation claim against the union and the improper discharge claim against the employer are properly governed by the same statute. A reexamination of *Wallace* suggests that these principles are equally applicable to the present case and that a similar result should obtain here.

This Court reaches the conclusion that summary judgment is appropriate despite the arguments set forth in plaintiff's brief which seek to have the Court distinguish or reconsider *Wallace*. First, Mitchell suggests that he is not seeking to vacate an arbitration award since a meaningful arbitration of his grievance never occurred. However, the failure to seek to vacate the award *in haec verba* cannot be determinative. The relief sought was expressly denied in an arbitration award issued as a result of a full-scale, arbitration proceeding. The effect of any grant of the relief sought by this Court would be to vacate the determination of the arbitrators.

Plaintiff additionally calls attention to a footnote in the Supreme Court decision of *UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696, 707 n. 9 (1965), which states that "other questions would be raised if this case presented a state law characterization of a 301 suit that reasonably

described the nature of the cause of action, but required application of an unusually short or long limitation period." *Id.* note 9, at 707. In view of the three-month statute of limitations contained in the Federal Arbitration Statute, 9 U. S. C. § 12, it is at least questionable whether the Supreme Court would regard the New York limitation as "too short." Nor is it apparent what "other questions" would be raised by plaintiff in this case as a result of the application of the 90-day period, or why such questions should be resolved in plaintiff's favor. The policy favoring "relatively rapid disposition of labor disputes" recognized in *Hoosier Cardinal* combines in this case with the policy favoring arbitration as a means of securing a quick and final resolution of disputes in general. Accordingly, for the reasons set forth herein and in this Court's earlier opinion in *Wallace v. AT&T, supra,* defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing plaintiff's complaint and to mail a copy of this opinion to counsel for all parties.

So Ordered.

Dated: Brooklyn, New York
October 23, 1979.

Charles P. Sifton
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1547

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

JUDGMENT

A Memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on October 25, 1979, granting defendants' motion for summary judgment, and directing the Clerk of Court to enter judgment dismissing plaintiff's complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; that defendants' motion for summary judgment is granted; and that judgment is hereby entered dismissing the complaint.

Dated: Brooklyn, New York
October 25, 1979

RICHARD H. WEARE
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 748—September Term, 1979
(Argued February 29, 1980 Decided March 3, 1980)
Docket No. 79-7803

WILLIAM MITCHELL,
Plaintiff-Appellant,

—v.—

UNITED PARCEL SERVICE, INC., and DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177,
Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
TIMBERS, *Circuit Judge,*
and WERKER, *District Judge.**

Appeal from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act as barred by the applicable New York statute of limitations.

Reversed and remanded.

DAVID JAROSLAWICZ, New York, N. Y. (Ira Leitel, Carol Mellor, and Leitel and

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* Hon. Henry F. Werker, United States District Judge for the Southern District of New York, sitting by designation.

Jaroslawicz, New York, N. Y., on the brief), *for appellant Mitchell.*

M. DAVID ZURNDORFER, New York, N. Y. (Edward Silver, Mark L. Goldstein and Proskauer Rose Goetz & Mendelsohn, New York, N. Y., on the brief), *for appellee United Parcel Service, Inc.*

ALBERT S. PARSONNET, Newark, N. J. (Parsonnet, Duggan & Pykon, Newark, N. J., on the brief), *for appellee Department Store And Wholesale Drivers, Warehousemen And Helpers Local Union #177.*

OPINION

TIMBERS, *Circuit Judge:*

Appellant William Mitchell appeals from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), as barred by the 90 day limitation period of § 7511 of the New York Civil Practice Law and Rules. The sole issue on appeal [1] is whether the district court erred in applying § 7511 to the instant action. We hold that it did.

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1. On appeal, appellees argue that the complaint was properly dismissed not only because it was time-barred, but also because appellant failed to exhaust his intra-union remedies and failed to raise a triable issue concerning appellee union's alleged breach of its duty of fair representation. The district court, however, did not address these issues. We therefore shall not address them for the first time here. Appellees are free to raise these issues in the district court on remand.

I.

Appellant, a member of Local Union #177 of the Department Store and Wholesale Drivers, Warehousemen and Helpers, was employed as a car washer by United Parcel Service, Inc. (UPS). In January 1977 appellant was discharged by UPS for dishonest acts, including "stealing time" and falsifying time cards. Appellant, who denied the charges against him, requested that his union file a grievance on his behalf contesting the discharge. As a member of Local Union #177, the terms of appellant's employment, including grounds for discharge and grievance procedures, were governed by the collective bargaining agreement between UPS and Local Union #177. Pursuant to this agreement, appellant's grievance was submitted to an arbitration panel—the Joint Atlantic Area Parcel Grievance Committee—for final resolution. Appellant was represented by his union at the hearing before this panel. On February 16, 1977 the arbitration panel denied appellant's grievance and upheld his discharge. According to the collective bargaining agreement, this decision was final and binding.

Seventeen months after the arbitral decision was rendered, appellant filed an action under LMRA § 301 [2] against his union and employer, alleging that UPS had breached the collective bargaining agreement by wrongfully discharging him and that Local Union #177 had breached its statutory duty of fair representation by the

2. Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), provides in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

manner in which it handled appellant's grievance. The district court granted appellees' motions for summary judgment, dismissing the complaint on the ground that the action was barred by the 90 day limitation period set forth in § 7511.[3]

II.

There is no federal statute of limitations applicable to § 301 actions. As a result, the Supreme Court has held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U. S. 696, 704-05 (1966).

The district court, reasoning the "[t]he effect of any grant of relief . . . would be to vacate the determination of the arbitrators," held that the appropriate state statute of limitations was the 90 day period for "application[s] to vacate or modify an [arbitration] award". N. Y. Civ. Prac. Law § 7511 (McKinney 1963). We disagree. We hold that the limitation period which should have been applied is New York's six year period for actions alleging breach of contract. N. Y. Civ. Prac. Law § 213(2) (McKinney 1972).

In addressing the question of which New York statute of limitations should be applied in this case, we turn first to our decision in *Abrams v. Carrier Corp.*, 434 F. 2d 1234 (2 Cir. 1970), *cert. denied*, 401 U. S. 1009 (1971), where we held that:

---

3. N. Y. Civ. Prac. Law § 7511 (McKinney 1963) provides that:

> "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."

> "when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period . . . is the six-year limitation set out in N. Y. CPLR § 213(2) for 'an action upon a contractual obligation or liability express or implied.'" *Id.* at 1252-53 (footnote omitted).

The factual claims underlying the § 301 action in *Abrams* were the same as those in the instant case, namely, a wrongful discharge by the employer coupled with a bad faith failure by the union to represent the employee adequately in discharge proceedings. The only difference between *Abrams* and the instant case is that here the employee was terminated after his grievance was rejected at arbitration, whereas in *Abrams* the grievance was not taken to arbitration. Citing this difference, appellees urge that we apply a different statute of limitations to the § 301 action in this case than the six year statute of limitations which we applied to the § 301 action in *Abrams*. We do not believe that such a fractionalized approach to § 301 wrongful discharge actions is warranted.

In determining which state statute of limitations to apply to a federal cause of action, courts must characterize the action in the manner that "best effectuates the federal policy at issue." *Butler v. Local Union 823, Int'l Brotherhood of Teamsters, etc.*, 514 F. 2d 442, 446 (8 Cir. 1975); *Charney v. Thomas*, 372 F. 2d 97, 100 (6 Cir. 1967). Appellees, pointing chiefly to the federal policy of according finality to arbitration awards and the federal goal of "relatively rapid disposition of labor disputes," *Int'l Union, etc. v. Hoosier Cardinal Corp.*,

supra, 383 U. S. at 707, argue that § 301 wrongful discharge actions commenced *after* arbitral decisions should be governed by the [redacted]y limitation period even if other § 301 wrong[redacted]ge actions are governed by another statut[redacted]

We do not a[redacted]eme Court has made it clear that the f[redacted] of according finality to arbitration awar[redacted]ld to the conflicting federal policy of providi[redacted]ployees with the opportunity "to secure individual redress for damaging failure of the employer to abide by the [collective bargaining] contract." *Hines v. Anchor Motor Freight, Inc.,* 424 U. S. 554, 571 (1976). In *Hines,* the Court granted discharged employees the right to sue employers and unions under § 301 despite the fact that the discharges had been upheld in "final" arbitration. In so doing, the Court rejected the argument that the federal policy of according finality to arbitration awards prevented employees from contesting arbitral decisions in § 301 actions. If we were to limit employee § 301 actions to a 90 day period following the adverse arbitral decision, we would severely restrict the Supreme Court's decision to allow employees to challenge arbitral decisions in conjunction with charges of bad faith representation by their union.

Furthermore, § 301 actions do not require the short limitation periods which are generally applied to assaults on arbitration awards. Contrary to the district court's characterization, § 301 actions cannot be equated to direct attacks on arbitration awards, nor can they be viewed as the same threat to the finality of arbitration awards. Arbitration awards cannot be vacated pursuant to § 301 on the ground that the arbitrators erred in their factual findings, or that the arbitrators reached faulty legal conclusions, or that the proceedings were flawed. *Hines*

v. Anchor Motor Freight, Inc., supra, 424 U. S. at 571; *Barbarino v. Anchor Motor Freight, Inc.,* 421 F. Supp. 1003, 1005 (W. D. N. Y. 1976). Rather, actions under § 301 are limited to those rare cases where the discharged employee can demonstrate *both* that the employer violated the collective bargaining agreement by discharging him *and* that the union violated its statutory duty by failing to represent him in good faith.

This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge. There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge. To require an employee—who is suddenly out of work—to obtain new counsel and file an action against his union and employer all within 90 days of his discharge strikes us as unwarranted.

Neither do we accept the argument that the 90 day limitation period is necessary to further the federal goal of relatively rapid disposition of labor disputes. The Court in *Hoosier, supra,* 383 U. S. at 707, indicated that a six year statute of limitations adequately furthered this federal labor policy. Far from suggesting that a 90 day period was needed to reach the goal of "relatively rapid" resolution of disputes, the *Hoosier* Court indicated that "unusually short" limitation periods—such as a 60 day New Mexico statute—should not be applied to § 301 actions. 383 U. S. at 707 n. 9.

Finally, we note that the characterization of § 301 actions such as the instant one as actions "to vacate arbitration awards" is not even conceptually sound. First, an action to vacate an arbitration award under New York law may not be instituted by discharged employees like appellant. *In re Soto,* 7 N. Y. 2d 397, 165

N. E. 2d 855, 198 N. Y. S. 2d 282 (1960). This difference is not an insubstantial one. While it may be reasonable to require the parties to a bargaining agreement (*i.e.*, the union and the employer) to contest an arbitral decision within 90 days, individual employees may well lack the resources to act as quickly. Second, a § 301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. "Although the effect of a judgment for [the discharged employee] would be to nullify the arbitral decision, the § 301 action is 'independent' of the grievance process . . . . Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance." *Smart v. Ellis Trucking Co.*, 580 F. 2d 215, 219 (6 Cir. 1978), *cert. denied*, 440 U. S. 958 (1979); *see Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 567-68; *Vaca v. Sipes*, 386 U. S. 171 (1967).

Regardless of whether an arbitration decision has been entered, the issue in a § 301 wrongful discharge action remains whether the employer has breached the collective bargaining contract and whether a union breach of duty contributed to the contractual breach. *Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 568. The mere fact that an arbitral decision has been rendered during the course of the employee termination process does not convert the character of a § 301 action from an action for breach of contract to an action for vacating an arbitration award.

III.

In summary, we reject the district court's characterization of the instant § 301 action as an action to vacate an arbitration award, and accordingly reverse the district court's dismissal of appellant's complaint as barred by § 7511. We hold that New York's six year limitation

period for contractual breaches, § 213(2), is applicable to LMRA § 301 actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless of whether the discharge was upheld by an arbitral panel or became final short of arbitration. Applying the six year limitation period of § 213(2) provides for relatively rapid disposition of labor disputes without undermining an employee's ability to vindicate his rights through § 301 actions. Thus, application of § 213(2) rather than § 7511 allows us to "best effectuate" the several federal policies implicated by actions under § 301.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of March, one thousand nine hundred and eighty.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. WILLIAM B. TIMBERS
Circuit Judge
HON. HENRY F. WERKER
District Judge

79-7803

WILLIAM MITCHELL
Plaintiff-Appellant

v.

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177
Defendants-Appellees.

JUDGMENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May, one thousand nine hundred and eighty.

Present: HON. IRVING R. KAUFMAN
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. HENRY R. WERKER
District Judge

79-7803

WILLIAM MITCHELL
Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177
Defendants-Appellees.

ORDER

A petition for a rehearing having been filed herein by counsel for the Appellee United Parcel Service, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of May, one thousand nine hundred and eighty.

79-7803

WILLIAM MITCHELL

Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177

Defendants-Appellees.

ORDER

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee United Parcel Service, Inc., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Circuit Judge

STATE STATUTES OF LIMITATIONS *

I. State Statutes of Limitations Governing Actions to Vacate Arbitration Awards.

Forty-two (42) states have enacted special statutes of limitations governing actions to vacate arbitration awards. In twenty-eight (28) of these states, the time limit prescribed is 90 days:

> Alaska Stat. § 9.43.120; Ark. Stat. Ann. § 34-522; Colo. Rev. Stat. § 13-22-214; Del. Code Ann. Tit. 10 § 5714; Fla. Stat. Ann. § 682.13; Idaho Code § 7-912; Ill. Ann. Stat. ch. 10 § 112 (Smith-Hurd); Ind. Code § 34-4-2-13; Kan. Stat. Ann. § 5-412(b); LSA-R. S. 9:4213 (West); Me. Rev. Stat. Ann. Tit. 14 § 5938; Minn. Stat. Ann. § 572.20; Nev. Rev. Stat. Ch. 38 § 145 (2); N. J. Stat. Ann. § 2A:24-7 (West); N. M. Stat. Ann. § 44-7-13; N. Y. CPLR § 7511 (McKinney); N. C. Gen. Stat. § 1-567.13; Ohio Rev. Code Ann. § 2711.13 (Page); Okla. Stat. Ann. Tit. 15 § 812 (West); 5 Pa. Cons. Stat. Ann. § 173 (Purdon); R. I. Gen. Laws § 10-3-15; S. C. Code § 15-48-130; S. D. Comp. Laws § 21-25A-25; Tex. Ann. Civ. St. art. 237; Utah Code Ann. § 78-31-18; Wash. Rev. Code Ann. § 7.04.180; Wis. Stat. Ann. § 788.13 (West); Wyo. Stat. § 1-36-114

In nine (9) states the time limit prescribed is less than 90 days:

> Ala. Code § 6-6-15 (10 days); Ariz. Rev. Stat. Ann. § 12-1506 (10 days); Conn. Gen. Stat. Ann. § 52-420 (West) (30 days); Hawaii Rev. Stat.

* Reprinted from Appendix F of the petition for certiorari in *United Steelworkers v. Flowers*, with permission of the Steelworkers.

§ 658-11 (10 days); Md. Stat. Ann. CJ § 3-224 (30 days); Mass. Gen. Laws Ann. ch. 150C § 11 (30 days); Mich. Gen. Court Rules 769 (20 days); Ore. Rev. Stat. § 33.310 (20 days); Vt. Stat. Ann. tit. 21 § 541 (30 days)

The statute of limitations for bringing an action to vacate an arbitration award is 100 days in California (Calif. Civil Proc. Code § 1288 (Deering)) and one year in New Hampshire (N. H. Rev. Stat. Ann. § 542.8). In Mississippi and Missouri an action to vacate an arbitration award must be brought at the next term of court after the award is made. (Miss. Code Ann. § 11-15-29; Mo. Ann. Stat. § 435.120 (Vernon)). In Georgia, after an award is returned to superior court and entered in its minutes, either party can, at the term to which said award is returned, suggest that the award is illegal (Ga. Code Ann. § 7-219).

II. State Statutes of Limitations Governing Actions for Breach of Written Contract in the 42 States Listed in Part I.

In each of the forty-two states with a special arbitration statute of limitations, the general statute governing actions for breach of written contract prescribes a much longer time period. The most common time limit for the latter is six years, found in twenty-four (24) of such states:

Ala. Code § 6-2-34; Alaska Stat. § 09.1.050; Conn. Gen. Stat. Ann. § 52-576 (West); Colo. Rev. Stat. § 13-80-110; Ga. Code Ann. § 3-705; Hawaii Rev. Stat. § 657-1; Me. Rev. Stat. Ann. tit. 14 § 752; Mass. Gen. Laws Ann. ch. 260 § 2; Mich. Stat. Ann. § 27A.5807(8); Minn. Stat. Ann. § 541.05; Miss. Code Ann. § 15-1-49; Nev. Rev. Stat. ch. 11 § 190.1; N. H. Rev. Stat. Ann. § 3508.4; N. J. Stat. Ann. § 2A:14-1

(West); N. M. Stat. Ann. § 37-1-3; N. Y. CPLR § 213(2); Ore. Rev. Stat. § 12.080; 42 Pa. Cons. Stat. Ann. § 5527; S. C. Code § 15-3-530; S. D. Comp. Laws § 15-2-13; Utah Code Ann. § 78-12-23; Vt. Stat. Ann. tit. 12 § 511; Wash. Rev. Code Ann. § 416.040; Wis. Stat. Ann. § 893.19 (West)

The statute of limitations for bringing an action for breach of a written contract is twenty years in Indiana (Ind. Code § 34-1-2-2); 15 years in Ohio (Ohio Rev. Code Ann. § 2305.06); and ten years in the following five states:

Ill. Ann. Stat. ch. 83 § 17 (Smith-Hurd); L. S. A.-C. C. art. 3544; Mo. Ann. Stat. § 516.110; R. I. Gen. Laws § 9-1-13; Wyo. Stat. § 1-3-105

The statute of limitations for bringing an action for a breach of a written contract is five years in the following five states:

Ark. Stat. Ann. § 37-209; Fla. Stat. Ann. § 95.11(2); Idaho Code § 5-216; Kan. Stat. Ann. § 60-511; Okla. Stat. Ann. tit. 12 § 95(1st) (West)

The statute of limitations for bringing an action for a breach of a written contract is four years in the following three states:

Ariz. Rev. Stat. Ann. § 12-550; Calif. Civil Proc. Code § 337; Texas Stat. Ann. Civ. St. § 5529

The statute of limitations for bringing an action for a breach of a written contract is three years in the following three states:

Del. Code Ann. tit. 10 § 8106; Md. Stat. Ann. CJ § 5-101; N. C. Gen. Stat. § 1-52

III. State Statutes of Limitations Governing Actions for Breach of Oral Contract in the 42 States Listed in Part I.

In *United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), this Court, in the context of a § 301 action which did not involve an arbitration award, upheld "borrowing" the state statute of limitations applicable to suits on oral (rather than written) contracts. In each of the forty-two states with a special arbitration statute of limitations, the statute governing actions for breach of an oral contract prescribes a much longer time period.

The statute of limitations for bringing an action for breach of an oral contract is six years in the following eighteen states:

> Ala. Code § 6-2-34; Alaska Stat. § 09.10.050; Colo. Rev. Stat. § 13-80-110; Hawaii Rev. Stat. § 657-1; Ind. Code § 34-1-2-1; Me. Rev. Stat. Ann. tit. 14 § 572; Mass. Gen. Laws Ann. ch. 260 § 2; Mich. Stat. Ann. § 27A.5807(8); Minn. Stat. Ann. § 541.05; N. H. Rev. Stat. Ann. § 508.4; N. J. Stat. Ann. § 2A:14-1 (West); N. Y. CPLR § 213(2); Ohio Rev. Code Ann. § 23.05.07 (Page); Ore. Rev. Stat. § 12.080; S. C. Code § 15-3-530; S. D. Comp. Laws § 15-2-13; Vt. Stat. Ann. tit. 12 § 511; Wisc. Stat. Ann. § 893.19

The statute of limitations for bringing an action for breach of an oral contract is five years in the following three states:

> Ark. Stat. § 37-213; Ill. Ann. Stat. ch. 83 § 16; Mo. Ann. Stat. § 516.120(1)

The statute of limitations for bringing an action for breach of an oral contract is four years in the following nine states:

Ariz. Rev. Stat. § 12-550; Fla. Stat. Ann. § 95.11(3); Ga. Code Ann. § 3-706; Idaho Code § 5-217; Nev. Rev. Stat. ch. 11 § 190.2; N. M. Stat. Ann. § 37-1-4; 42 Pa. Cons. Stat. Ann. § 5525; Tex. Stat. Ann. Civ. St. art. 5529; Utah Code Ann. § 78-12-25

The statute of limitations for bringing an action for breach of an oral contract is three years in the following eight states:

Conn. Gen. Stat. Ann. § 52-581; Del. Code Ann. tit. 10 § 8106; Kan. Stat. Ann. § 60-512; Md. Stat. Ann. CJ § 5-101; Miss. Code Ann. § 15-1-29; N. C. Gen. Stat. § 1-52; Okla. Stat. Ann. tit. 12 § 95(2d); Wash. Rev. Code Ann. § 4.16.080

In Louisiana and Rhode Island the statute of limitations for bringing an action for breach of an oral contract is ten years (L. S. A.-C. C. art. 3544; R. I. Gen. Laws § 9-1-13).

In Wyoming the statute of limitations is eight years (Wyo. Stat. § 1-3-105) and in California the statute of limitations is two years (Calif. Civil Prac. Code § 339).

No. 80-169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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ADDITIONAL REASON FOR GRANTING THE WRIT.

Petitioner files this supplemental brief under Rule 22.6 of the Rules of the Supreme Court of the United States because, on September 10, 1980, after both the Petition for Certiorari and the Brief in Opposition had been filed, the United States Court of Appeals for the Third Circuit created a conflict between circuits by its decision in **Liotta v. National Forge Co.**, — F. 2d —, Nos. 79-2124 & 79-2252 (3d Cir. 1980) (reprinted at B1-B9).

This Court Should Grant Certiorari to Resolve the Newly Created Conflict Between Circuits.

In its original petition, petitioner argued that the federal policy favoring the settlement of labor disputes by arbitration requires the federal courts to apply the short statutes of limitations for the vacation of arbitration awards to § 301 suits against employers when those suits seek to relitigate issues already determined in arbitration. Even in § 301 suits claiming that the employee may relitigate his previously arbitrated claim because of assertions that the union had failed in its duty of fair representation, petitioner urged that labor peace depended upon a prompt limitation upon the time in which issues settled in arbitration may be relitigated. In support of this contention, petitioner cited numerous district court cases applying the statute of limitations for the vacation of arbitration awards to § 301 suits brought after the issue had been decided in binding arbitration. On the other hand, petitioner conceded that the only two courts of appeals which had decided the issue had concluded that the arbitration vacation statute was inapplicable to § 301

suits and that a longer tort or contract statute should be applied.[1]

In **Liotta v. National Forge Co.**, *supra*, however, the United States Court of Appeals for the Third Circuit, reversing the district court, dismissed a § 301 action against the employer as barred by the three-month statute of limitations of the Pennsylvania General Arbitration Act. The court applied the short statute for two reasons.

First, the court held that "a fair reading of Liotta's complaint demonstrates that he seeks to vacate the arbitrator's decision" since "he sought to litigate before the district court the same claim he presented for arbitration, that of improper discharge" (B4). The court continued:

> "Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him." (B4).

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1. In addition to the Court of Appeals for the Second Circuit's opinion below and **Smart v. Ellis Trucking Co.**, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979), both cited by petitioner, respondent cites **Howard v. Aluminum Workers International Union**, 589 F. 2d 771 (4th Cir. 1978), **Price v. Southern Pacific Transportation Co.**, 586 F. 2d 750 (9th Cir. 1978), and **Gray v. International Association of Heat & Frost Insulators**, 416 F. 2d 313 (6th Cir. 1969), as cases which reach the same result as the Court of Appeals for the Second Circuit. Yet not one of these additional cases supports respondent. In none of these cases has there been an arbitration or an arbitration award and, accordingly the courts could not have rejected the statute of limitations for vacating arbitration awards in favor of a longer statute of limitations.

Second, the court held that "the result we reach comports with the general federal policy favoring arbitration as a means of resolving labor disputes . . . and with the federal labor policy that favors the application of shorter limitations period[s]." (B4, citation omitted).

This decision of the Court of Appeals for the Third Circuit, therefore, is based upon the very grounds that were advanced by petitioner in its Petition for Certiorari. The issue remains a crucially important one to the maintenance and establishment of labor peace and stability throughout the country. The vast majority of the states, like the federal government, have adopted a short statute of limitations for the vacation of arbitration awards. Now the United States Court of Appeals for the Third Circuit has joined the great majority of district court decisions holding that the arbitration statute of limitations applies to § 301 actions against employers following arbitration awards. This Third Circuit holding conflicts with the decisions of the Courts of Appeals for the Second and Sixth Circuits and should be resolved both because the conflict will lead to directly contrary decisions in different circuits concerning the right to bring § 301 suits and because the issue is of great importance and likely to be litigated frequently.

CONCLUSION.

Because of the newly created conflict between circuits, as well as the reasons set forth in the original petition, we respectfully urge that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in this case be granted.

Respectfully submitted,

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Dated: September 25, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2124 and 79-2252

JAMES J. LIOTTA, an individual,
Appellant in No. 79-2124

v.

NATIONAL FORGE COMPANY,
Appellant in No. 79-2252

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. CIV. No. 78-0025)

Argued: July 8, 1980

Before: SEITZ, *Chief Judge,* VAN DUSEN,
and HIGGINBOTHAM, *Circuit Judges*
(Filed: September 10, 1980)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*

The appellant, James J. Liotta, formerly President of the Local 1573 of the United Steelworkers of America, AFL-CIO (the Union), was discharged from his employment with the National Forge Company (the Company) on March 16, 1976. This followed his participation in a work stoppage at the Company's Erie, Pennsylvania plant which began on March 3, 1976 and ended on March 11, 1976. Liotta filed a grievance pursuant to the terms of the collective bargaining agreement then in effect. His grievance was denied by an arbitrator on August 3, 1976. On March 16, 1978, he filed this action alleging first that his discharge violated the collective bargaining agreement in violation of Section 301 of the National Labor Relations Act, 29 U. S. C. § 185 and that the arbitrator's contrary decision resulted from the Union's breach of its duty of fair representation. Second, he claimed that the Company discharged him because of his espousal of the rights of the Company's black employees, discriminating against him in violation of 42 U. S. C. § 1981. Liotta appeals from the entry of summary judgment for the Company. The Company cross

appeals on the ground that Liotta's complaint is barred by the applicable statutes of limitations. We conclude that his claim under Section 301 is time barred, that his claim under 42 U. S. C. § 1981 is not time barred, and that summary judgment was inappropriate on his Section 1981 claim because of the existence of material issues of fact. We will therefore affirm in part and reverse in part.

I.

The first question we must answer is whether Liotta's Section 301 [1] cause of action was untimely and therefore whether the Company's motion to dismiss should have been granted. The Company's motion was based on the ground that Liotta's claims were barred by the three-month statute of limitations of the Pennsylvania General Arbitration Act, Pa. Stat. Ann. tit. 5 § 173 (Purdon 1963). The district court held that the six-year limitations period for actions upon a contract applied.

We believe the district court erred in *UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696, 704-05 (1966), the Supreme Court held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Courts within this circuit have consistently applied the three-month limitations period to suits seeking to vacate an arbitrator's award. *Cole v. United Steelworkers*, 441

1. Section 301(a) provides, in relevant part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U. S. C. § 185.

F. Supp. 1346, 1351 (M. D. Pa. 1977), *aff'd mem.*, 588 F. 2d 819 (3d Cir. 1978); *Siskey v. General Teamsters, Chauffeurs,* 419 F. Supp. 48, 50 (W. D. Pa. 1976); *UMWA v. Jones & Laughlin Steel Corp.*, 378 F. Supp. 1206, 1211-12 (W. D. Pa. 1974); *International Brotherhood v. Motor Freight Express,* 356 F. Supp. 724, 726 (W. D. Pa. 1973).

It is important to identify the nature of Liotta's first cause of action since the three-month statute of limitations of Pennsylvania's General Arbitration Act would apply only where one seeks to vacate an arbitrator's award. A fair reading of Liotta's complaint demonstrates that he seeks to vacate the arbitrator's decision. Paragraph 22 of his complaint alleges that he "was unfairly represented before, during and after Arbitration by the" attorney for the International Union. App., at 10. Paragraph 23 alleges that the "Arbitration itself was improper and unfair." App., at 12. Indeed, he sought to litigate before the district court the same claim he presented for arbitration, that of improper discharge.

Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him.

The result we reach comports with the general federal policy favoring arbitration as a means of resolving labor disputes, *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960), and with the federal labor policy that favors the application of shorter limitations period. In *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696, 707 (1966), the Supreme Court stated:

> [R]elatively rapid disposition of labor disputes is a goal of federal labor law. Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with that goal.

Courts in other jurisdictions have consistently applied the statute of limitations pertaining to appeals from arbitration awards rather than the longer statute of limitations governing actions bottomed on written contracts when such actions seek to vacate arbitration awards. *E.g. Barbarino v. Anchor Motor Freight, Inc.*, 421 F. Supp. 1003 (W. D. N. Y. 1976); *DeLorio v. United Parcel Service, Inc.*, 401 F. Supp. 408 (D. Mass. 1975); *Hill v. Aro Corp.*, 275 F. Supp. 482 (N. D. Ohio 1967); *contra, Smart v. Ellis Trucking Co.*, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979).

We therefore conclude that Liotta's first cause of action seeking review and vacation of the arbitration award was untimely and that the Company's motion to dismiss should have been granted.

II.

The next issue we must consider concerns Liotta's claim under 42 U. S. C. § 1981.[2] As a threshold matter,

2. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. § 1981.

however, we must first address the Company's assertion that this claim is also time barred.

As with Section 301, 42 U. S. C. § 1981 provides no explicit period of limitations and courts are bound to apply the most appropriate limitations period provided by state law. *Johnson v. Railway Express Agency,* 421 U. S. 454, 462 (1975). This Court, in *Davis v. U. S. Steel Supply,* 581 F. 2d 335 (3d Cir. 1978), held that the six-year statute of limitations for contracts under Pennsylvania law applied to a Section 1981 claim of unlawful discharge. We therefore conclude that Liotta's second cause of action under 42 U. S. C. § 1981 is not barred as untimely.

With regard to the merits of Liotta's Section 1981 claim, the district court granted the Company's motion for summary judgment for the following reasons:

> The only evidence which plaintiff has submitted to the court in support of his allegations is a letter from Bobby Kaigler, Compliance Officer of the Erie Human Relations Commission (EHRC), which states that plaintiff testified before the EHRC on behalf of black complainants who were discharged by defendant and that "It is the belief of this office that Mr. James Liotta was terminated from his job because of his constant fight for 'Equal Rights' of all men." (Plaintiff's summary judgment exhibit 7n). This letter is not an affidavit and it has not been notarized. Consequently, the conclusory "belief" expressed in the letter, which is not based on personal knowledge, is insufficient to create or support an inference that racial discrimination played any part in plaintiff's discharge. Olympic Junior, Inc. v. David Crystal, Inc., 463 F. 2d 1141 (3rd Cir. 1972). No genuine issue of material fact supporting plaintiff's claim has been presented by plaintiff's evidence.

Liotta v. National Forge Company, Civ. No. 78-0025 (W. D. Pa. July 11, 1979), at 11-12, *reprinted in* App., at 45-46.

Liotta claims, however, that he also submitted to the district court the charge he filed with the Equal Employment Opportunity Commission (EEOC) listing a number of instances where he encouraged black employees to file charges against the Company. The affidavit which was attached to his EEOC charge and which was also before the court, alleged that the Company discharged him in retaliation for his activities in support of the rights of black employees. Specifically, he averred:

> I have consistently attempted to eliminate discrimination as practiced by Respondent Employer against Black members of Local 1573 of the United Steelworkers of America. The Respondent Company systematically has violated the non-discrimination clause known as Appendix I of the collective bargaining agreement between National Forge and Local 1573. Some of the ways I opposed discrimination, including the following: I encouraged a large number of Union members to report their allegations of discrimination to the Erie Human Relations Commission; since I began duties as President of Local 1573 in October, 1975, I encouraged a number of Black workers to file charges with such Commission, and advised them of my knowledge of the best way to remedy the specific acts they were complaining of. I also fought the company on a day-to-day basis in trying to make conditions fair for all workers. I helped to take a case to arbitration on behalf of Black worker, Dennis Toliver. Shortly before my discharge, I had notified the Respondent Employer that two other grievances of Black workers (the

> grievances of Troy Johnson and Aaron Clanton) regarding discrimination claims, were going to be fought through the arbitration phase of the grievance procedure. I have appeared at a number of hearings of the Erie Human Relations Commission regarding the claims of discrimination by Black workers. Respondent Company has a history of unfair discharges of Black workers, and I have been active in opposing such practices.

App. at 51-52.

Our review of this document leads us to conclude that genuine issues of material fact are raised by Liotta's specific allegations. These are matters that clearly are in dispute and they are material because if proven they could support a finding that the Company's actions against Liotta were motivated by a racial animus.

In addition, contrary to the Company's argument, it is clear that Liotta has set forth specific facts, not merely conclusory allegations of wrongdoing by the Company. Moreover, the Company has not denied that these documents were in fact before the district court as part of the record. Instead, the Company challenges the EEOC affidavit as not complying with the technical requirements of Fed. R. Civ. P. 56(e) in that it was not alleged to be based on personal knowledge. That this argument is specious is evident from a reading both of the affidavit and of Rule 56(e). First, Rule 56(e) does not require that the affiant state affirmatively that the averments are based on personal knowledge. Rather, the Rule provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

A reading of Liotta's EEOC affidavit shows that it was "made on personal knowledge," "set[s] forth . . . facts as would be admissible in evidence," and "show[s] affirmatively that [he] is competent to testify to matters stated therein."

The fact that these allegations may not be proved at trial if the jury chooses to believe the Company is irrelevant at this stage. What is relevant is that the parties have focused on specific, pertinent issues of fact and disagree strenuously about them. We therefore conclude that summary judgment was inappropriate and that the case should be remanded on the Section 1981 claim. *See Bryson v. Brand Insulations, Inc.*, No. 79-2042, slip op. at 7 (3d Cir. Apr. 30, 1980).

III.

Accordingly, we will affirm the district court's judgment as to Count I of the appellant's complaint. We will reverse the district court's grant of summary judgment on the appellant's Section 1981 claim and remand for further proceedings.

No. 80-169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Counsel for Respondent

PETITION FOR CERTIORARI FILED AUGUST 5, 1980.
CERTIORARI GRANTED OCTOBER 14, 1980.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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DOCKET ENTRIES (District Court)

7/20/78	Complaint filed. Summons issued.
8/31/78	Summons ret. and filed/executed
9/ 6/78	By SIFTON, J—Stip. & order extending the time for UPS to answer to 10-11-78.
9/14/78	By SIFTON, J.—Stipulation and order dtd 9/11/78, extending time to answer or otherwise move as to Deft Local Union #177, to Sept. 30, 1978. Filed.
10/ 4/78	ANSWER on behalf of Local Union No. 177, I. B. T., to complaint. Filed.
10/10/78	ANSWER of INT'L. BROTHERHOOD OF TEAMSTERS, etc. to complaint. Filed.
10/11/78	ANSWER of Deft United Parcel Service, Inc. filed
10/16/78	Pltff's interrogatories to deft local union #177, filed.
10/17/78	ANSWER, filed. jm (deft United Parcel Serv.)
10/25/78	Pltffs interrogatories to deft. United Parcel Service, filed.
11/ 2/78	AMENDED ANSWER of Deft United Parcel Service, Inc. filed
11/30/78	Responses of Deft United Parcel Service to Pltff's Interrogatories filed
12/ 8/78	Notice of Deft United Parcel Service, Inc. to take deposition of pltff on 1/4/79 at 10:00 a.m. filed

12/20/78 By Sifton, J.—Order dtd 12/19/78 Status conf 1/18/79 @ 4:30 PM, filed. jm copies sent.

1/18/79 BEFORE SIFTON, J. Case called. Status conference held. Case adj. to March 26, 1979 @ 4:30 PM to fix a date for trial

2/ 9/79 Amended answer of Local union 177 filed.

2/ 9/79 Stipulation that deft Local 177 may file an amended answer by 1/31/79 filed.

3/14/79 Notice to take deposition of J/ Purcell, J. Kilkenny filed.

3/26/79 Before SIFTON, J.—Case called for conf. pretrial order signed, pre-trial conf. for 6-20-79.

3/28/79 By SIFTON, J.—Civil Pretrial Order dated 3/23/79 that the attys for all parties shall be ready to proceed to trial after 6/20/79, etc. (see pretrial Order) filed

5/18/79 Before SIFTON, J.—Case called. Conference held & concluded.

6/ 5/79 Notice of motion with memo of law, ret 6/20/79 @ 4:30 PM for order discomplaint or granting summary judgment in defts favor, filed.

6/11/79 Notice of motion ret 6-20-79 at 4:30 PM filed by deft International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America for an order dismiss the complaint etc. filed with memo of law in support.

6/27/79 Stenographer's Transcript dtd 1/16/79, filed.

6/28/79 Before Sifton, J. Case called. Counsel for all sides present. Motion adjd to 8-15-79 at 9:30 a.m. Reply papers to be submitted by 8-13-79. Answering papers by 7-17-79.

7/19/79 Affidavit of William Mitchell, in opposition to summary judgment motion of deft's. Filed.

7/19/79 Pltff's memorandum of law, in opposition to deft's motion for summary judgment. Filed.

8/ 8/79 Letter from M. David Zurndorfer dtd 8-1-79 filed.

8/ 8/79 By SIFTON J—Order dtd 8-3-79 adjourning motion to dismiss to 9-12-79 at 9:30 A. M. filed on document #26.

9/ 4/79 Reply memo. in support of deft. Up's motion to dismiss and/or for summary judgment. filed

9/ 4/79 Kilkenny Supplemental affidavit in support of motion to dismiss and/or for summary judgment. filed

10/12/79 Before SIFTON, J. Case called. Counsel for all sides present. DECISION RESERVED. on balance of motion. Motion of International Union to dismiss GRANTED w/consent of pltff. International to submit separate judgment.

10/28/79 By SIFTON, J.—Judgment dtd 9/26/79, that the pltff take nothing of Deft. Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and this action be dismissed on the merits as to above named deft. Filed.

10/25/79 By SIFTON, J. MEMORANDUM & ORDER dtd 10/23/79 that defts motion for summary judgment is GRANTED & the clk is directed to enter judgment dismissing pltff's complaint & to mail a copy of this opinion to counsel for all parties, filed. Copies mailed to all counsel.

10/26/79 Judgment filed, signed by Clerk dtd 10-25-79, it is Ordered & Adjudged that the pltff take nothing of the defts; that defts motion for summary judgment is granted; & that judgment is hereby entered dismissing the complaint. (p/c mailed)

11/ 7/79 Bill of Costs in the amount of $550.13, filed

11/ 9/79 Notice of Appeal, filed. (copy of docket sheet and appeal mailed to C of A)

11/ 9/79 Receipt for filing record on appeal, filed. (copy mailed to C of A)

DOCKET ENTRIES (Court of Appeals)

11/13/79	Copy of notice of appeal and district court docket entries on behalf of appellant Mitchell filed
11/13/79	Copy of notice of payment of docketing fee in district court filed
11/16/79	Appellant Mitchell Form C, pfs filed
11/16/79	Appellant Mitchell Form D, pfs filed
11/23/79	Record on appeal filed (original papers of district court)
11/30/79	Scheduling Order #1, PC filed.
12/31/79	Appellant Mitchell brief, pfs filed.
12/31/79	Appellant Mitchell appendix, pfs filed.
1/25/80	Appellee UPS Inc. Brief pfs, filed.
2/19/80	Appellee Local 177, I. B. T. motion for extension of time to file brief, pfs filed. (Order endorsed: 2-21-80 granted for leave to file appellee's brief filed.
2/21/80	Appellee Department Store and Wholesale Drivers Warehouseman and Helpers Local Union #177 brief filed.
2/21/80	Appellant WILLIAM MITCHELL reply brief, pfs filed.
2/29/80	Case argued before Kaufman, Ch. J., Timbers, C.J., Werker, D.J.
3/ 3/80	Judgment reversed and remanded, published opinion, Timbers C.J.
3/ 3/80	Judgment filed.

3/12/80	Appellant WILLIAM MITCHELL itemized and verified bill of costs filed, pfs filed.
3/14/80	Appellant WILLIAM MITCHELL statement of cost filed.
3/14/80	Appellee UNITED PARCEL SERVICE, INC., et al motion for extension of time to file *petition for rehearing* until 3-24-80 pfs filed. Appellee UNITED PARCEL SERVICE, INC., et al motion for extension of time to file *petition for rehearing en banc* until 3-24-80 pfs filed (Order endorsed: 3-14-80: granted (WHT) filed.
3-24-80	Appellee UNITED PARCEL SERVICE, INC., *petition for rehearing pfs filed.* Appellee UNITED PARCEL SERVICE, INC., *petition for rehearing en banc pfs filed.*
5/ 7/80	Order denying Appellee United Parcel Service, Inc. petition for rehearing filed. Order denying Appellee United Parcel Service, Inc. petition for rehearing en banc filed.
5/15/80	Mandate (Judgment, statement of costs, Opinion) filed.
6/ 5/80	Record on Appeal Returned to District Court.
6/ 9/80	Record on Appeal Receipt filed.
8/11/80	Notice of filing of petition for writ of certiorari filed.
10/22/80	Certified copy of order of Supreme Court granting petition for writ of certiorari filed.

COMPLAINT WITH ATTACHMENTS
(Filed July 20, 1978)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C 1547

WILLIAM MITCHELL,

Plaintiff,

— against —

United Parcel Service, Inc., Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Defendants.

TRIAL BY JURY DEMANDED

Plaintiff complaining of the defendants by his attorneys IRA LEITEL and DAVID JAROSLAWICZ alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant the Labor Management Relations Act, 1947, § 301; 29 U. S. C. 185 and the Rules of Pendent Jurisdiction.

2. Venue is properly placed in the United States District Court for the Eastern District of New York, since the plaintiff resides within the Eastern District, many of the events complained of occurred within the Eastern District and the defendants are unions representing employees in the Eastern District of New York.

THE PARTIES

3. At all times hereinafter mentioned the plaintiff WILLIAM MITCHELL was employed by the defendant United Parcel Service, Inc. as a car washer.

4. Upon information and belief United Parcel Service, Inc. ("UPS") was a Delaware Corporation with its principal place of business in New Jersey and maintains offices throughout the United States including 643 West 43rd Street in the City, County and State of New York.

5. Upon information and belief at all times hereinafter mentioned the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (Local #177) was a labor organization of which the plaintiff was a member in good standing.

6. Upon information and belief the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International") was the parent organization of Local #177 and had a responsibility to protect the rights of its local's members.

AS AND FOR A FIRST CLAIM FOR RELIEF

7. At all times hereinafter mentioned the plaintiff was employed by the defendant UPS as a full time employee with the job title of car washer.

8. At the time of the occurrence complained of plaintiff had been employed by UPS for a period of approximately 13 years.

9. In or about 1976 and 1977 the defendant UPS made it known that it was seeking to eliminate full-time employees and replace them with part-timers.

10. In January of 1977, in an attempt to improperly dismiss the plaintiff from his position, the defendant UPS

charged the plaintiff with dishonesty, falsifying his time cards and various other actions and sought to discharge him from his position with UPS (See Exhibit "A", annexed hereto).

11. Pursuant to a collective bargaining agreement between Local #177, the International and UPS, the plaintiff advised the representatives of Local #177 that the charges brought against him were false and requested the union to file a grievance on his behalf so that the merits of the allegation could be heard by an arbitrator and to otherwise protect his rights and job.

12. The union defendants, particularly Local #177, filed a grievance on the plaintiff's behalf and advised the plaintiff that they would act on his behalf and protect his rights.

13. Despite the fact that the plaintiff had clearly advised the union, Local #177, that the charges brought against him were false and had no merit, the union, in a perfunctory fashion, prepared a grievance claiming that the plaintiff had in fact committed the improper actions he had been accused of but that the penalty of discharge was too severe. (See Exhibit "B", annexed hereto).

14. The defendants proceeded in an arbitrary fashion, in violation of due process and the plaintiff's rights under the collective bargaining agreement to advise the plaintiff by telegram on the afternoon of February 14, 1977 that the plaintiff's grievance would be heard by a panel of arbitrators in Virginia Beach, Virginia on February 16, 1977 and that if the plaintiff wished to attend he must assume all expenses. (See Exhibit "C", annexed hereto).

15. Upon receipt of the telegram the plaintiff advised the defendants that he did not have the funds to provide

transportation for himself and his witnesses to Virginia Beach, Virginia.

16. Despite such knowledge the defendants refused to provide the plaintiff with funds, an adequate opportunity to obtain funds to travel to Virginia, or to move the hearing to the New York area where the plaintiff would have an opportunity to contest the charges on the merits.

17. The defendants with knowledge that the plaintiff could not attend the hearing in Virginia, proceeded with the so-called hearing and found the plaintiff's discharge to have been proper. (See Exhibit "D", annexed hereto).

18. The plaintiff had in good faith attempted to utilize the contractual provisions of the collective bargaining agreement for settling disputes but those attempts were frustrated by the defendants actions which included:

a) the defendant, Local #177, despite actual knowledge of the plaintiff's denial of the allegations against him, instituted only a perfunctory defense, admitting the plaintiff had committed the wrongful acts he was charged with.

b) the defendant, Local #177, ignored the plaintiff's meritorious defense to the charges brought against him and processed that grievance in a perfunctory and grossly negligent fashion so as not to protect the plaintiff's rights. and

c) the defendants acted in an arbitrary and capricious manner by setting the arbitration hearing in Virginia Beach, Virginia, when all of the events and witnesses were in New York, and refusing to provide the plaintiff with funds to travel to Virginia to attend the hearing with his witnesses or to adjourn the hearing.

19. The defendants, by entering into a collective bargaining agreement, stripped the plaintiff of his traditional

form of seeking redress in the courts and then breached that collective bargaining agreement by acting in a discriminatory fashion, in bad faith and in an arbitrary and capricious manner so as to deprive the plaintiff of any hearing at all.

20. The defendants' improper actions as aforesaid caused the plaintiff to be damaged in that among other things, the plaintiff lost his position with UPS after 13 years including all benefits and pension rights, the plaintiff could not obtain other employment because of the nature of the charges brought against him, and as a result of which he was discharged, the plaintiff incurred many debts and financial obligations and was forced to undergo personal bankruptcy; he suffered a loss of reputation and his good-name, he suffered severe mental anguish and distress and the plaintiff was otherwise damaged.

21. By reason of the foregoing, plaintiff is entitled to recover from the defendants all of the damages which he has suffered by reason of the defendants wrongful acts as aforesaid.

AS AND FOR A SECOND CLAIM FOR RELIEF

22. Plaintiff repeats, reiterates and realleges all allegations contained in paragraphs one through twenty-one of this Complaint as if more fully set out herein.

23. Upon information and belief the charges brought against the plaintiff by the defendant UPS were known to be false at the time they were brought and the real reasons for bringing the charges against the plaintiff were because of the plaintiff's refusal to perform duties he was not required to perform pursuant to his employment agreement and in order to effectuate UPS policy to eliminate full-time employees and replace them with part-time employees

so that UPS could achieve a savings on the amount being paid to employees.

24. The defendants' actions in bringing false charges against the plaintiff and then upon information and belief conspiring with the remaining defendants to prevent the plaintiff from having an opportunity to defend against those charges and to insure his discharge were performed in a malicious, reckless and wanton manner without a regard for the rights of the plaintiff and with the intention of injuring the plaintiff knowing that this would cause the plaintiff to undergo mental anguish and distress.

25. By reason of the foregoing plaintiff is entitled to recover from the defendants for all of his damages by reason of their intentional infliction of mental distress and with the Doctrine of prima facte tort.

AS AND FOR A THIRD CLAIM FOR RELIEF

26. Plaintiff repeats, reiterates and realleges all allegations contained in paragraphs one through twenty-five of this Complaint as if more fully set out herein.

27. The defendant UPS acted maliciously and with a wilfull disregard for the plaintiff's rights in bringing charges against the plaintiff and preventing the plaintiff from defending against those charges so as to insure the plaintiff's discharge.

28. The defendant unions acted in a wilfully, wanton and reckless fashion, and breached their fiduciary obligations to the plaintiff by failing to properly present his grievance, presenting a knowingly inaccurate and inadequate defense and arranging for a hearing with the knowledge the plaintiff could not attend and leaving the plaintiff without any redress.

29. By reason of the foregoing plaintiff is entitled to recover punitive damages from the defendant.

WHEREFORE plaintiff demands judgment against the defendants as follows:

a) Plaintiff be restored to his position with all seniority, pension and other benefits.

b) Plaintiff be awarded his full back-pay from his date of discharge.

c) Plaintiff be compensated for all such other damages which he has suffered including substantial punitive damages and

d) Plaintiff be awarded such other and further relief as to the Court seems just and proper including a reasonable attorneys fee and the costs and disbursements of this motion.

IRA LEITEL and DAVID JAROSLAWICZ
Attorneys for the Plaintiff

Office and P. O. Address
Two Lafayette Street
New York, New York 10007
(212) 596-1600

Exhibit "A"

January 28, 1977

Mr. William Mitchell
431 Woolley Avenue
Staten Island, New York 10314

Dear Mr. Mitchell:

A meeting was held in the Staten Island Center on January 13, 1977. Present were you, Local 177 officials Joe Purcell and Don Mason, shop steward Harry Stanley, Ray Cooper, Lou Pillarella, Nick Melillo, Brian Flynn and myself.

The purpose of the meeting was quite specific. We reviewed with you the fact that on numerous instances, you were observed leaving the job prior to the completion of your work day. In an effort to conceal this, you falsified your time cards. Your acts were ones of dishonesty and constitute a complete dereliction of your responsibilities as an employee.

When confronted with these facts, you denied them completely and your only explanation was that the charges against you were lies and we were out to get you. You made these comments in spite of the fact that several supervisors observed you on different occasions leaving the job.

We mentioned that we could not tolerate dishonesty from any of our employees.

As a company, we provide you with substantial wage and fringe benefits. For these benefits, we expect that all of our employees be honest with us and provide us with a fair days work.

We made it quite clear to you that you have left us no choice in this matter. Your dishonest acts cannot be toler-

ated by United Parcel Service. Based on all these *facts* presented at this meeting, we have no choice but to discharge you from our employ.

Very truly yours,

UNITED PARCEL SERVICE
/s/ JIM KILKENNY
Jim Kilkenny
DIVISION MANAGER

JK/vac
cc: B. Pastor
J. Kilkenny
Local #177
Personnel
CERTIFIED MAIL #325872

Exhibit "B"

THIS FORM MUST BE USED IN FILING ALL GRIEVANCES

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Date Received _____

Case No. _____

For Committees' Use Only:

Date Case Heard _____

PRE-HEARING INFORMATION

In order that the Committee Members may be familiar with the important features in this case, will you kindly fill out the following form as completely as possible. The information submitted herein will be treated as a preliminary general statement of your position.*

1. Union Name Dept. Store & Wholesale Drivers, Local 177
   Address 1001 Springfield Avenue, Irvington, N. J.
2. Name of Agent handling particular grievance Joseph Purcell
3. A. Name of Employee filing complaint William Mitchell
   B. Classification of Work Car Washer
   C. Date of Employment May 18, 1964
4. UNITED PARCEL SERVICE, INC.
   1321 Travis Avenue, Staten Island, New York
   (Address of Operation Involved)
5. Circumstances of the Dispute *(Check one)*:
   A. Warning Notice ( ) C. Discharge (X)
   B. Disciplinary time off ( ) D. Back pay claim (X)
   E. Others ( )

6. Date on which Company took action against employee January 13, 1977
7. Indicate that part of your contract which you claim was violated Article 45 (Supplement)
8. Date on which alleged violation took place June 16, 18, 20, 30, July 1, 6, 7, 8.
9. Date on which grievance was first taken up with management July 8, 1977
10. Exact amount of back pay, if any, claimed by aggrieved employee all
11. Your position (also include brief resume of pertinent facts—use back of sheet if necessary)

Mr. Mitchell was discharged for stealing time and falsifying Company records. Local 177 feels this discharge was unjust and Mr. Mitchell should be reinstated with full back pay. On Friday nights the Company allows our members to go home four hours undertime. They also have them lock the building. The Company's managers and supervisor consent to this type of activity, then it must be assumed that they will tolerate other types of misconduct. Local 177 feels that Mr. Mitchell should have been warned to stop what he was doing. Local 177 feels that Mr. Mitchell should have been suspended instead of fired.

/s/ JOSEPH J. PURCELL
For the party filing grievance

Date: FEB 3-1977

* PREPARE FOUR (4) COPIES
1st Copy—Mail to Union Co-Secretary
2nd & 3rd Copies—Mail to Employer Co-Secretary
4th Copy—Local Union

Exhibit "C"

2013735209 TDMT Irvington NJ 41 02-14 1224P EST
PBA 015 1239P
PMS WILLIAM MITCHELL, RDM REPORT DELIVERY BY MAILGRAM, DLR

431 WOOLEY AVE
STATEN ISLAND NY 10314 (*Get Time & Signature*)

PLEASE BE ADVISED THAT YOUR GRIEVANCE AGAINST UNITED PARCEL SERVICE CONCERNING YOUR DISCHARGE WILL BE HEARD BY THE PANEL ON WEDNESDAY FEBRUARY 16 1977 IN VIRGINIA BEACH VIRGINIA IF YOU WISH TO ATTEND YOU MUST ASSUME ALL YOUR EXPENSES PLEASE ADVISE RALPH PORFORA, LOCAL 177 (1001 SPRINGFIELD AVE IRVINGTON NJ 07111)

Exhibit "D"

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Established in accordance with the terms and conditions of the Atlantic Area Parcel Agreement, entered into by and between the several Local Unions and United Parcel Service, Inc.

Docket No. 874

IN THE MATTER OF THE DISPUTE BETWEEN

Teamsters Local #177, Irvington, N. J.
(City and State)

and

UNITED PARCEL SERVICE, INC.

SUBMISSION

We, the undersigned, parties to the Atlantic Area Parcel Agreement, hereby agree to submit the following dispute for a decision under the Rules of Procedure prescribed by the Atlantic Area Parcel Grievance Committee, by virtue of its authority, as set forth in Article 7 of the Atlantic Area Parcel Agreement.

> On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated with full back pay.

The undersigned further agree that a majority decision of the Joint Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 7 of the Atlantic Area Parcel Agreement.

Date: 2-16-77

Employer: United Parcel Service, Inc.
Signed by: William Pastor
Title: District Manager
Local Union: 177
Signed by: Joseph Purcell
Title: Business Agent

DECISION

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

Frank Feely	Al Barlow
Employer Co-Secretary	*Union Co-Secretary*
2-16-77	2-16-77
Date	*Date*

AMENDED ANSWER OF DEFENDANT UNITED PARCEL SERVICE, INC.

(Filed October 11, 1978)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

AMENDED ANSWER

Defendant UNITED PARCEL SERVICE, INC. (hereafter "UPS"), by its attorneys, Proskauer Rose Goetz & Mendelsohn, for its amended answer to the complaint herein, alleges:

1. Denies the allegations set forth in paragraph 1 of the complaint, except admits that plaintiff purports to invoke the jurisdiction of this Court under the statutory provisions cited.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 3, 7, and 8 of the complaint, except admits that plaintiff was employed by UPS from on or about May 18, 1964 until on or about January 13, 1977, and that he was employed full time as a car washer from on or about January 13, 1969 to the date of his discharge.

4. Denies the allegations set forth in paragraph 4 of the complaint, except admits that UPS maintains offices throughout the United States including an office at 643 West 43rd Street in the City, County and State of New York.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 of the complaint, except admits that the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (hereafter "Local #177"), is a labor organization.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 6 of the complaint.

7. Denies the allegations set forth in paragraph 9 of the complaint.

8. Denies the allegations set forth in paragraph 10 of the complaint, except admits that on January 13, 1977 plaintiff was discharged from UPS for dishonesty, stealing time and falsifying his time cards.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in para-

graphs 11 and 12 of the complaint, except admits that Local #177 did file a grievance on plaintiff's behalf.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 13 of the complaint, except admits that the document annexed to the complaint as Exhibit B was submitted by Local #177 to a panel of the Atlantic Area Parcel Grievance Committee (hereafter the "Grievance Committee").

11. With regard to paragraphs 14, 15, and 16 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

12. Denies the allegations set forth in paragraph 17 of the complaint, except admits that a panel of the Grievance Committee heard Local #177's grievance over plaintiff's discharge, at Virginia Beach, Virginia on February 16, 1977, and voted to deny Local #177's grievance and uphold plaintiff's discharge.

13. With regard to paragraph 18 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

14. Denies the allegations set forth in paragraphs 19, 20, and 21 of the complaint.

15. With regard to paragraph 22 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

16. Denies the allegations set forth in paragraphs 23, 24, and 25 of the complaint.

17. With regard to paragraph 26 of the complaint, insofar as the allegations refer to defendant UPS, denies said allegations.

18. Denies the allegations set forth in paragraph 27 of the complaint.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 28 of the complaint.

20. Denies the allegations set forth in paragraph 29 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

21. The complaint fails to state a claim upon which relief can be granted against defendant UPS.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

22. Plaintiff's action against defendant UPS is barred by the applicable statute of limitations.

23. Based upon the foregoing, plaintiff is barred from seeking or receiving the relief demanded by the complaint.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

24. Plaintiff has failed to exhaust the available intra-union remedies within defendant Local #177 and defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

25. Based upon the foregoing, this Court lacks jurisdiction of this action, and plaintiff is barred from seeking or receiving the relief demanded by the complaint.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

26. Defendant UPS is, and at all times relevant to this action was, a party to a collective bargaining agreement with defendant Local #177.

27. Said collective bargaining agreement governs all the terms and conditions of employment of certain em-

ployees including all car washers at UPS' Staten Island, New York operating center—including the conditions pursuant to which defendant UPS may terminate employees and the manner or method pursuant to which disputes concerning such terminations shall be resolved.

28. On or about January 13, 1977, plaintiff was employed by defendant UPS as a car washer at the defendant's Staten Island, New York operating center. Accordingly, the terms and conditions of plaintiff's employment—including the conditions pursuant to which defendant UPS was entitled to terminate plaintiff and the manner or method pursuant to which any dispute concerning such termination was to be resolved—were governed by the collective bargaining agreement between defendant UPS and defendant Local #177.

29. The collective bargaining agreement provides that all disputes arising under the agreement, including disputes arising from defendant UPS' termination of plaintiff, shall be resolved in accordance with a grievance procedure, the results of which are final and binding upon defendant UPS and defendant Local #177 and upon employees such as plaintiff, employed by defendant UPS pursuant to the agreement.

30. Under the grievance procedure set forth in the collective bargaining agreement, disputes which UPS and Local #177 are unable to resolve are submitted to a panel of the Grievance Committee, which is comprised of three representatives of UPS and three representatives of the unions that subscribe to the Committee; but in no event may the panel that hears a particular grievance include any representative of UPS, or of a union, that is involved with the grievance. A decision by the panel majority is final and cannot be appealed further.

31. On information and belief, when plaintiff was notified of his impending termination, he advised defendant Local #177 of his claim or grievance that said termination by defendant UPS would be an alleged violation of the collective bargaining agreement. Following its receipt of such notification, defendant Local #177 processed and pursued plaintiff's claim or grievance by investigating the facts and circumstances leading to and the cause for plaintiff's discharge, and by meeting with defendant UPS. When it was unable to reach agreement with UPS on a resolution of plaintiff's grievance, Local #177 submitted the grievance to a panel of the Grievance Committee, which was scheduled to meet during the week of February 14, 1977 at Virginia Beach, Virginia.

32. A six-person panel of the Grievance Committee (whose three union members did not include any representative of Local #177), heard plaintiff's grievance on February 16, 1977. The panel then voted to deny the grievance and sustain plaintiff's discharge. Under the terms of the agreement, the panel's decision constituted a final and binding determination of plaintiff's claim or grievance that defendant UPS violated the collective bargaining agreement.

33. Based upon the foregoing, plaintiff is barred from seeking or receiving the relief demanded by the complaint.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

34. Defendant UPS repeats and realleges the allegations set forth in paragraphs 26 through 33, *supra*, with the same force and effect as if more fully and completely set forth herein.

35. The exclusive method by which any dispute arising from or in connection with defendant UPS' termination of plaintiff is to be resolved is in accordance with

the grievance procedures set forth in the collective bargaining agreement.

36. Based upon the foregoing, this Court lacks jurisdiction of this action and plaintiff is barred from seeking or receiving the relief demanded by the complaint.

WHEREFORE, defendant UPS demands judgment dismissing the complaint, together with costs, disbursements and attorney's fees of this action, and respectfully requests that this Court grant defendant UPS such further relief as it may deem just and proper.

PROSKAUER ROSE GOETZ & MENDELSOHN
By /s/ HOWARD L. GANZ
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300 Park Avenue
New York, New York 10022

To:

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Attorneys for Plaintiff

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Department Store and Wholesale
Drivers, Warehousemen and
Helpers, Local Union #177, and
International Brotherhood of
Teamsters, Chauffeurs, Warehousemen
and Helpers of America

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Newark, New Jersey 07102
Attorneys for Defendant
Department Store and Wholesale
Drivers, Warehousemen and
Helpers, Local Union #177

AMENDED ANSWER OF DEFENDANTS DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177 AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

(Filed February 9, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. 78 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant.

AMENDED ANSWER ON BEHALF OF LOCAL UNION NO. 177, I. B. T.

Defendant Local Union No. 177 (hereinafter referred to as defendant local union) by way of Answer to the complaint herein says:

1. Defendant local union denies the allegations contained in paragraph 1.

2. Defendant local union admits the allegations contained in paragraph 2.

3. Defendant local union admits the allegations contained in paragraph 3 up to March 28, 1977.

4. This defendant does not have such knowledge.

5. Defendant local union admits the allegations contained in paragraph 5.

6. Defendant local union admits the allegations contained in paragraph 6.

7. Defendant local union admits the allegations contained in paragraph 7 as far as up to February 13, 1977.

8. Defendant local union admits the allegations contained in paragraph 8.

9. Defendant local union denies the allegations contained in paragraph 9. This is specifically provided to the opposite of this paragraph of the complaint by the collective bargaining agreement.

10. Defendant local union admits the allegations contained in paragraph 10.

11. Defendant local union denies the allegations contained in paragraph 11. At one time plaintiff said that some of the company allegations were false and at another occasion he said they were true.

12. Defendant local union admits the allegations contained in paragraph 12 and states the local union did so.

13. Defendant local union denies the allegations contained in paragraph 13. The union did not admit wrong doing, did not act perfunctorily but did argue that even if an employee were guilty of the offenses charged, the penalty was too severe. The local union acted in good faith, in compliance with its regular procedures.

14. Denied. The Atlantic Area Grievance Committee which is set up by a collective bargaining agreement covering much of the United States East Coast and many local unions set its meetings and meeting places. Such

meetings have never been held in New York or New Jersey, but usually in D. C., Virginia, Pennsylvania, Maryland, South Carolina or North Carolina. This defendant local union followed its duty and usual practice by notifying plaintiff by telegram. The invariable practice of this defendant local union is that all grievants must pay their own way; some have chosen to do so and some have not.

15. Defendant local union denies paragraph 15. Plaintiff has never mentioned any witnesses to this defendant but did say he did not have the funds for the trip.

16. Defendant local union denies paragraph 16. Plaintiff never mentioned getting time to get the funds and never requested a move of the hearing site, which cannot be done anyway; at the panel sessions, grievances are heard from the entire "Atlantic" area.

17. Defendant local union denies paragraph 17. This defendant took the position that the discharge was improper and presented plaintiff's sworn statement which was voluntarily prepared and submitted by plaintiff.

18. Defendant local union denies paragraph 18.

A. Defendant local union denies subparagraph A. Plaintiff denied and admitted company allegations on different occasions. Defense was not perfunctory but plenary and in good faith and in such a manner as this defendant felt would likely produce the best results for plaintiff in view of the nature, quality and quantity of the case against plaintiff.

B. Defendant local union denies subparagraph B.

C. Defendant local union denies subparagraph C.

19. Defendant local union denies the allegations of paragraph 19. This is a frivolous and false allegation.

Collective bargaining agreements are required by law and practicality and so are grievance procedures. It is denied that there is any tradition of seeking redress for discharge from employment in court; on the contrary, contracts with grievance procedures are traditional.

20. Defendant local union denies paragraph 20. As a matter of fact, an agent of this defendant offered to get plaintiff another job and plaintiff refused the offer. This defendant has successfully done this for many other discharged employees.

21. Defendant local union denies paragraph 21.

22. This defendant local union answers as above.

23. Defendant local union has no such knowledge and therefore denies paragraph 23.

24. Defendant local union has no such knowledge and therefore denies paragraph 24.

25. Defendant local union denies paragraph 25.

26. Answered as above.

27. Defendant local union has no such knowledge and therefore denies paragraph 27.

28. Defendant local union denies paragraph 28.

29. Defendant local union denies paragraph 29.

First Affirmative Defense

30. The Complaint fails to state a cause of action.

Second Affirmative Defense

31. Plaintiff has failed to exhaust available internal remedies within Local 177 and the International Union.

WHEREFORE, defendant Local Union No. 177 demands judgment in favor of Local 177, I. B. T. against plaintiff.
Dated: New York, New York

January , 1979

PARSONNET, DUGGAN & PYKON
10 Commerce Street
Newark, New Jersey 07102
(201) 622-8347

COHEN, WEISS and SIMON

By .....
(A Member of the Firm)

605 Third Avenue
New York, New York 10016
(212) 682-6077

Attorneys for Defendant
Department Store and Wholesale
Drivers, Warehousemen and Helpers,
Local Union 177

NOTICE OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF THE DEFENDANT UNITED PARCEL SERVICE, INC.
(Filed June 11, 1979)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

78 C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed Statement Pursuant to General Rule 9(g) and Affidavit of James Kilkenny and exhibits thereto, sworn to June 4, 1979, and upon the accompanying Memorandum of Law, defendant United Parcel Service, Inc. will move this Court before the Honorable Charles P. Sifton, on Wednesday, June 20, 1979, at 4:00 p.m., or as soon thereafter as counsel may be heard, in Courtroom 4 of the United States Courthouse, 225

Cadman Plaza East, Brooklyn, New York, for an order, pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure, dismissing the complaint and/or granting summary judgment in defendant's favor, for an award of the costs and reasonable attorneys' fees incurred by defendant on this motion, and for such other, further, and additional relief as to this Court may seem just and proper.

Dated: New York, New York
June 4, 1979

Yours, etc.
PROSKAUER ROSE GOETZ & MENDELSOHN

By /s/ M. DAVID ZURNDORFER
Attorneys for Defendant
United Parcel Service, Inc.
300 Park Avenue
New York, New York 10022
Tel. (212) 593-9000

To:

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Attorneys for Plaintiff

Cohen, Weiss & Simon
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New York, New York 10016
Attorneys for Defendants
Department Store and Wholesale
Drivers, Warehousemen and
Helpers, Local Union #177, and
International Brotherhood of
Teamsters, Chauffeurs, Warehousemen
and Helpers of America

Parsonnet, Duggan & Pykon
10 Commerce Street
Newark, New Jersey 07102
Attorneys for Defendant
Department Store and Wholesale
Drivers, Warehousemen and
Helpers, Local Union #177

DEFENDANT UNITED PARCEL SERVICE, INC.'S 9(g) STATEMENT IN SUPPORT OF SUMMARY JUDGMENT MOTION DATED JUNE 4, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

STATEMENT PURSUANT TO
GENERAL RULE 9(g)

Defendant United Parcel Service, Inc. ("UPS") contends that there is no genuine issue to be tried with respect to the following material facts:

1. Plaintiff was employed by UPS as a car washer at the Staten Island Center.

2. Plaintiff was discharged from UPS on January 13, 1977, at a hearing in which plaintiff, union representatives, and company representatives were present. Plaintiff was

informed at the hearing that he was being discharged for his dishonest acts of stealing time and falsifying his time cards on numerous observed occasions. At the time of his discharge, plaintiff was aware that there would be a hearing before the Joint Panel of the Grievance Committee concerning his discharge.

3. The terms and conditions of plaintiff's employment—including the conditions pursuant to which defendant UPS was entitled to terminate plaintiff's employment and the procedures by which any dispute concerning such termination was to be resolved—were governed by the collective bargaining agreement between UPS and Local Union #177.

4. Pursuant to the collective bargaining agreement, plaintiff's grievance over his discharge was submitted to a Joint Union-Management Panel of the Grievance Committee. Pursuant to the established practice under the collective bargaining agreement, plaintiff received a telegram on February 14, 1977, confirming that the hearing would be held in Virginia Beach, Virginia on February 16, 1977, and that he could attend if he assumed his own expenses.

5. The location of the hearing at Virginia Beach was the result of the customary rotation of panel locations. The panel serves employees in widely distant parts of the eastern United States. Plaintiff's grievance was only one of a number from various states heard on February 16, 1977 at Virginia Beach. Panel locations are selected by the co-secretaries of the Joint Panel to accommodate people from these distant areas.

6. At the hearing Company and union representatives submitted documented testimony and exhibits concerning plaintiff's discharge, including a statement setting forth

the numerous observed instances of plaintiff's dishonesty and irresponsibility, and a statement written by plaintiff denying all of the Company's allegations. The union representative also argued in plaintiff's defense that, even if plaintiff had committed the alleged offenses, the penalty of discharge was too severe, and a suspension would be more appropriate.

7. The Joint Panel decided on February 16, 1977, to uphold plaintiff's discharge. Pursuant to the collective bargaining agreement, that decision of the Joint Panel is final and binding.

8. The instant lawsuit was commenced by plaintiff on July 20, 1978, more than seventeen months after the decision of the Joint Panel.

9. Prior to commencing this lawsuit, plaintiff did not pursue or exhaust the intra-union remedies provided for in and made mandatory by his union constitution.

Dated: New York, New York
June 4, 1979

Respectfully submitted,

PROSKAUER ROSE GOETZ
& MENDELSOHN

By /s/ M. DAVID ZURNDORFER
Attorneys for Defendant
United Parcel Service, Inc.
300 Park Avenue
New York, New York 10022
Tel. (212) 593-9000

AFFIDAVIT OF JAMES KILKENNY SWORN TO JUNE 4, 1979 IN SUPPORT OF SUMMARY JUDGMENT MOTION AND EXHIBITS ANNEXED THERETO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

KILKENNY AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES KILKENNY, being duly sworn, deposes and says:

1. I am employed by United Parcel Service, Inc. ("UPS" or the "Company") as Division Manager. I make this affidavit in support of defendant UPS's motion for dismissal of the complaint and/or for summary judgment.

2. This is an action for breach of the duty of fair representation brought by William Mitchell, who was employed by UPS as a car washer at the Staten Island Center

(the "center" or "building"). Mr. Mitchell claims that Local Union #177's alleged misconduct in the prosecution of his grievance before the Joint Panel of the Joint Atlantic Area Parcel Grievance Committee (the "Joint Panel") entitles him to a judgment that would vacate the final and binding decision of the Panel and restore to Mitchell his employment with UPS. Because of my position as Division Manager, I am aware of the circumstances which led UPS to terminate Mr. Mitchell's employment and of the procedures that were utilized in accordance with the collective bargaining agreement to resolve Mr. Mitchell's grievance following the termination of his employment.

3. Mr. Mitchell was discharged from UPS on January 13, 1977, for his dishonest acts of "stealing time" * and falsifying his time cards. He was discharged after he had been observed by numerous Company supervisors on a total of six separate occasions leaving or being otherwise absent from his job hours prior to its completion. Although on each such occasion Mr. Mitchell worked considerably less time than was required, he always turned in a falsified time card indicating that he had worked even longer than the regularly scheduled shift, and, therefore, that he was entitled to overtime pay.

4. I was informed by my supervisors of each observed instance when Mr. Mitchell failed to complete his regularly scheduled work day and yet submitted a time card for the day claiming entitlement to pay for hours he had not worked. I have personally checked Mr. Mitchell's time cards for these days and have confirmed that he has falsely claimed that he had completed his regular shift and worked overtime on those dates; and that he had claimed to be entitled to many dollars in regular and overtime pay for work that he had not performed. When Mr. Mitchell's

* "Stealing time" means to procure payment for time not worked.

grievance over his discharge was submitted to the Joint Panel pursuant to the grievance procedure, I submitted on the Company's behalf a statement setting forth in detail the instances of Mr. Mitchell's observed dishonest conduct. This statement was received in evidence by the Joint Panel, and a copy of the statement is attached as Exhibit A.

5. For example, on July 2, 1976, when plaintiff was scheduled to work an 8-hour shift ending at 3:00 a.m., he was observed leaving the building at 12:45 a.m. Although he did not return to the building that night, plaintiff submitted a time card claiming that he had punched out at 4:15 a.m. and thus was entitled to his regular pay plus one-and-one-quarter hours overtime. Again on July 7, 1976, two supervisors observed plaintiff departing from the building at 1:33 a.m. and not return. One supervisor watched the center's only time clock from 3:35 until 5:00 a.m., making certain that plaintiff did not punch the clock during that period. Yet plaintiff subsequently submitted a time card showing a punch-out time of 4:09 a.m., and thus claiming an hour and nine minutes in overtime pay. Similar incidents occurred on June 16, June 18, June 29, and July 8, 1976. On each occasion, plaintiff left the building an hour or more before the end of his regular shift and then submitted a time card claiming that he had worked a full shift plus overtime.

6. The numerous instances of dishonesty set forth in Exhibit A, observed by seven different UPS supervisors and managers, convinced me that Mr. Mitchell was not a person whom UPS should retain in its employ. I scheduled a meeting for the evening of July 14, 1976 to review the situation with Mr. Mitchell and his union representatives and to terminate his employment. However, this hearing had to be postponed when, on the morning of July

14, 1976, Mr. Mitchell claimed that he had injured his back while working. It should be noted that there was no witness to the claimed accident. (See the copy of the Employee Occupational Injury Or Illness Report attached as Exhibit B.) For the next five months, Mr. Mitchell did not report to work but instead collected Worker's Compensation benefits. (Tr., pp. 50-59.) *

7. Finally, I was able to hold the hearing at the Staten Island Center on January 13, 1977. Present at the hearing were Mitchell, Local Union #177 officials Joseph Purcell and Donald Mason, Shop Steward Harry Stanley, several Company supervisors, and myself. I reviewed with Mr. Mitchell his numerous dishonest acts of stealing time and falsifying time cards. After hearing and considering the union's arguments on Mr. Mitchell's behalf, I then informed Mr. Mitchell that his dishonest and irresponsible behavior necessitated that we terminate his employment with UPS. A letter to Mr. Mitchell from myself, dated January 28, 1977, reviewing the events of this hearing and confirming the termination of his employment with UPS, is attached as Exhibit C. Mr. Mitchell has subsequently stated at his deposition, held on January 16, 1979, that he was well-represented by the union at this hearing (Tr., p. 69.).

8. Pursuant to the grievance and arbitration provisions of the collective bargaining agreement, the relevant provisions of which are attached as Exhibit D, Mr.

* Mitchell also requested and secured Worker's Compensation benefits for the 4½ weeks between the date of his discharge and the date of the Joint Panel hearing. A copy of the Workmen's Compensation Board Notice of Decision is attached as Exhibit I. Since, as plaintiff himself has conceded, he was not disabled during that period and was not working solely because of his discharge (Tr., pp. 126-30), he was not entitled to any such compensation.

Mitchell's grievance over his discharge was processed by his local union to the Joint Panel of the Atlantic Area Parcel Grievance Committee. All of the procedures that were followed concerning the processing of Mr. Mitchell's grievance were completely non-discriminatory and evidence a total lack of any animus against him.

9. With respect to the notification procedures followed, plaintiff received as much notice of his hearing before the Joint Panel as have other grievants under the collective bargaining agreement. In no way was Mr. Mitchell singled out for any irregular or discriminatory notification of his pending hearing. At his deposition, Mr. Mitchell testified that he knew on January 13, 1977, that there was going to be a hearing before the Joint Panel. (Tr., pp. 91-92.) The hearing was not held until thirty-three (33) days later. He also testified at his deposition that he had received a telegram on February 14, 1976, confirming that there would be a hearing of his case on February 16th before the Joint Panel, and that he could attend if he wished to assume his own expenses. (Tr., p. 95.) This was the regular procedure followed in every grievance hearing in my experience under the terms of the collective bargaining agreement in effect between the parties. Moreover, the location of the hearing at Virginia Beach, Virginia was solely the result of the customary rotation of panel locations. The Joint Atlantic Area Parcel Grievance Committee serves employees in widely distant parts of the eastern United States. Thus, the panel locations are selected by the co-secretaries of the Joint Panel to accommodate people from these distant areas. This location was not chosen to discriminate in any way against Mr. Mitchell. His grievance was only one of a number from various states being heard that day in Virginia Beach; indeed, the grievance immediately preceding his own was filed by an employee located in South Carolina.

10. The procedures followed at the February 16th hearing were entirely in accordance with the established procedure of the parties in proceedings before the Joint Atlantic Area Parcel Grievance Committee. In accordance with that procedure, which requires that the Company present its case first, I submitted copies of the statement (referred to above, and annexed as Exhibit A) setting forth in detail the instances of Mr. Mitchell's observed dishonest conduct. Mr. William Pastore, UPS's District Manager, informed the Panel that we had for their inspection the time cards at issue, and notarized statements from each of the seven supervisors who had observed Mr. Mitchell's dishonest acts.

11. Plaintiff was represented before the Joint Panel by Joseph Purcell, the Business Agent of Local Union #177. Mr. Purcell submitted in plaintiff's defense a notarized statement prepared by Mr. Mitchell himself, denying all of the Company's allegations. A copy of that statement is attached as Exhibit E. In addition, the union representative urged the Joint Panel to consider the possibility of suspension rather than discharge as an appropriate remedy. Given the obvious persuasiveness of the Company's submission to the Joint Panel—including the large number (7) of witnesses who had observed one or more of Mr. Mitchell's dishonest acts, and the large number of separate incidents of dishonesty (6) that had been observed—it was, in my judgment, certainly reasonable for Mr. Purcell to believe that he might have a better chance to secure a reduction in the severity of discipline than to hope for an all-out victory. Nor, based upon my experience, was this an unusual position for a union representative—faced with a persuasive case of serious misconduct—to take.

12. At no time prior to the commencement of this lawsuit in July 1978, did plaintiff give any indication that

he was dissatisfied by the manner in which Mr. Joseph Purcell and Local Union #177 represented him before the Joint Panel. Indeed, in a letter mailed by plaintiff to Frank Fitzsimmons, the General President of the international union, subsequent to the hearing, plaintiff complimented Joseph Purcell and his other union representatives and wrote:

> "Local#177 to which i've been a member of for 13 years has done a excellent job in protecting my rights under the contract.
>
> Joe Purcell and Donald Mason B. A.'s for the local have done a tremendous job in my behalf."

A copy of this letter is attached as Exhibit F.

13. I was present at the Joint Panel hearing and know of no basis for any claim that there was anything unfair or discriminatory in the manner in which it was conducted. The six-person panel of the grievance committee heard all the evidence and argument from both sides, asked questions, and then reserved judgment. The following day the Panel announced its decision upholding the Company's discharge of Mr. Mitchell. A copy of the Joint Panel's decision is attached as Exhibit G. That decision is final and binding under the terms of the collective bargaining agreement.

14. Subsequent to the Joint Panel's decision, Mr. Mitchell made no use of the appellate procedures contained in the union constitution which have been designed for the purpose of remedying an alleged case of unfair representation. These procedures are spelled out in the Teamster's Constitution, Article XIX, which is attached as Exhibit H. The procedures provide for a grievant to protest the Local Union's handling of his case by filing a complaint with the Local Union Executive Board and, if

unsuccessful, by filing an appeal to the Union Joint Council and its Executive Board. Further appeals may be taken to the General Executive Board of the International Union and, ultimately, to the International Convention. Counsel has informed me, as defendant UPS's Memorandum of Law shows on pp. 28-30, that these very procedures of the Teamster Constitution have been consistently upheld by the courts and have been found to provide adequate provisions for internal relief. The union constitution provides that these intra-union remedies must be exhausted before a grievant can resort to litigation. Nevertheless, Mr. Mitchell has completely ignored these procedures prior to commencing the instant lawsuit.

15. Without using, let alone exhausting, the intra-union remedies provided for in his union constitution, Mr. Mitchell commenced the instant lawsuit seventeen months after the decision of the Joint Panel upholding his discharge. Counsel has informed me, as defendant UPS's Memorandum of Law shows on pp. 7-11, that the applicable statute of limitations bars the instant lawsuit because it was commenced by plaintiff more than ninety days after the Joint Panel's decision.

WHEREFORE, it is respectfully requested that defendant's motion be granted in all respects.

/s/ JAMES KILKENNY
James Kilkenny

Sworn to before me this 4th day of June, 1979.

/s/ L. ROBERT BATTERMAN
Notary Public
L. ROBERT BATTERMAN
Notary Public, State of New York
Qual. in N. Y. Co. No. 60-0189810
Commission Expires March 30, 1981

Exhibit A

William Mitchell has been employed by United Parcel Service since May 18, 1964.

On Thursday, January 13, 1977, he was discharged from United Parcel Service for his dishonest acts of stealing time and falsifying his time cards.

During his employment, William Mitchell has been a package driver, preloader, and at the time of his discharge, a car washer at our Staten Island, New York operating center. His scheduled start time is 6:30 P. M., he gets a half hour for lunch and his scheduled 8 hours are up at 3 A.M.

The events leading up to his discharge are significant and bear repeating in that they show a clear pattern of his total disregard for his responsibilities as an employee.

Not once, but on seven separate occasions, Bill Mitchell was observed by company supervisors leaving his job several hours prior to its completion. On each instance he turned in a time card showing in fact that he had worked 8 hours or longer.

Our first indication that he was not completing his assigned work day occurred on Wednesday, June 16, 1976.

On that date, Ed Schmidl, shop supervisor, arrived at the Staten Island Center at 1:55 A. M. to work with the mechanic, Steve Giglio. When he arrived, there were four employees in the Center. Bill Mitchell was not there. Ed remained in the Center until 11:00 A. M. in the morning. Ed did not see Bill Mitchell at any time while in the Center. Yet Bill Mitchell's time card for that day showed he started work at 6:30 P. M. and finished at 3:43 A. M. Mitchell was paid for 8.72 hours of work. Ed Schmidl reported what he had observed to Center Manager Lou Pillarella and told Lou he was coming back to work with the mechanic on 6/18/76 and would check on William Mitchell's presence on the job.

On Friday, June 18, 1976, Ed Schmidl arrived at the Staten Island Center at 2:15 A. M. Upon entering the building, Ed checked it completely. William Mitchell was not there. Ed Schmidl observed the time clock until 4:30 A. M. and saw seven men use it. At no time did he see William Mitchell in the center or use the time clock. William Mitchell's time card showed a punch out time of 4:04 A. M. Mitchell was paid for 9.06 hours of work.

On Monday, June 28th at 11:00 P.M., Ken Kett, Loss Prevention Supervisor, and Kenilworth supervisor Nick Melillo arrived at the Staten Island Center. At 12:45 A. M. on June 29th, they observed Bill Mitchell leave the building. They followed Bill to his home on Woolley Avenue, which he entered. They then returned to the Staten Island Center and observed the building until 4:30 A. M. Bill Mitchell never returned to the building. He turned in a time card with a punch out time of 4:15 A. M. and was paid for 9.24 hours.

On Tuesday, June 29, Bill's time card showed a punch in date of June 29 at 6:16. His time card also showed a punch out date of June 29, 4:27 A. M. Brian Flynn saw Bill Mitchell arrive at the Staten Island Center at 6:45 P. M. on June 29 but Bill's time card as indicated above showed a punch in time of 6:16 P. M.

On July 1st at 10:00 P. M., Nick Melillo and Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not at the center. At 10:35 P. M., Nick Melillo entered the building and completely inspected it. Bill Mitchell was not in the building. At 11:30 P. M. they both observed Bill Mitchell return to the building. At 12:45 A. M. on July 2, 1976, they both observed Bill Mitchell leave the Staten Island building. They watched the building until 4:20 A. M. and never saw Bill Mitchell return. At 4:30 A. M. they drove past Bill Mitchell's house and his car was parked there. Bill Mitchell turned in a

time card with a punch out time of 4:15 A .M. and was paid for 9.25 hours.

On Tuesday, July 6th between 9:00 and 9:05 P. M., supervisor Brian Flynn and Loss Prevention supervisor Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not on the property. At 9:30 P. M. they observed Bill Mitchell's car parked in front of his home. They both returned to the Staten Island Center and saw Bill Mitchell return to the building at 10:50 P. M. At 1:33 A. M., July 7th, they observed Bill Mitchell leave the building in his car. At 1:50 A. M., Brian Flynn went past Mitchell's house and saw his car there. He then returned to the center and Ray Zienowicz and himself watched the building until 3:30 A. M. Between 3:30 and 3:35 A. M., Brian Flynn entered the building and Steve Giglio, the mechanic, was the only one inside. Flynn observed the time clock until 5:00 A. M. The only people to use the clock were the four night men. Bill Mitchell turned in a time card with a punch out time of 4:09 A. M. Mitchell was paid for 9.09 hours.

Once again, on Wednesday, July 7th, Brian Flynn and Ray Zienowicz were at the Staten Island Center at 9:00 P. M. At 12:24 A. M. on July 8, 1976, they both observed Bill leave with his car. They watched the building until 3:30 A. M. At that time, Ray Zienowicz drove to Bill Mitchell's home and saw his car parked in front of his home at 3:30 A. M. At 3:30 A. M. Brian Flynn entered the Staten Island building and observed the time clock until 5:00 A. M. The only people to use the clock were three night men. The fourth night man was late and Brian signed him in at 4:20 A. M. Bill Mitchell turned in a time card with a punch out time of 4:24 A. M. and was paid for 9.28 hours.

On Thursday, July 8th, at 5:57 P. M., John Burnetsky, the District Auditor, who was working in the center for

the day, observed Bill Mitchell punch a time card to start work. At 9:00 P. M. Ken Kett, Lou Pillarella and Ray Zienowicz arrived at the Staten Island Center. Between 9:55 and 10:00 P. M. they observed Bill Mitchell leave the building in his car. They drove to Mitchell's house where he arrived at 10:20 P. M. They then returned to the Staten Island Center. At 11:30 P. M. Mitchell returned to the Center. At 12:25 A. M. on July 9th, Bill Mitchell left the building and started to drive away. At that time, he was confronted by Lou Pillarella and Ken Kett. When asked where he was going, Bill Mitchell replied, to lunch. He was then asked where he had been from 9:55 to 11:30. He replied he had gone home for an emergency. Center Manager Lou Pillarella then asked to see his time card. Bill handed him a card with just a punch out time of 12:35 on it. He asked Bill why he had not punched in, he said he forgot. Lou told Bill that was strange inasmuch as John Burnetsky had observed him punch in at 5:57 P. M. Lou also told Bill that he knew what Bill had been doing and what had been going on. To this Bill answered that he was going home sick. Lou informed him that he was going to be put on a notice of discharge for dishonesty. He then started his car and left.

At this point, it must be pointed out and already is quite obvious that on seven known occasions, Bill Mitchell left work early and was paid for work he did not perform. He falsified his time cards in order to conceal his activities and to receive unearned pay.

It bears further mentioning that Bill Mitchell's actions were not those of a responsible employee.

At the local hearing held for Bill Mitchell, all of the facts surrounding the incidents were reviewed with him. When asked specific questions as to his activities on the dates in question, Bill commented that none of the facts were true. He further commented that we were out to get him because he was a long seniority employee.

As a result of Bill Mitchell's dishonest acts of stealing time and falsifying his time cards, and because he could not or would not explain his actions, Bill Mitchell was discharged from our employ. (Exhibit I).

As a company we must place our trust in all of our employees.

They are entrusted with large sums of money, and pick up, sort and deliver parcels with high value. Due to the nature of our business, many of our employees spend most of their work day without direct supervision.

When any employee violates this trust by committing dishonest acts, we must deal quickly and severely with that person.

Such was the case with Bill Mitchell.

Bill Mitchell's actions were not those of a responsible employee and constitute a clear dereliction of his duties as an employee.

We must again repeat that not once but on seven known occasions he was observed stealing time. He tried to conceal his acts by keeping two sets of books, so to speak. It is evident Bill Mitchell found some way to tamper with the time clock in order to falsify his time cards and collect unearned pay.

If we were to condone this type of behavior from Bill Mitchell or any other employee, the fact remains quite clear that our ability to remain in business would be severely challenged. It is further obvious that the jobs of our other employees would be placed in jeopardy.

We had no choice in this matter but to discharge Bill Mitchell.

He has no one to blame but himself in this case.

Based on all of the facts presented, we respectfully submit that the claim of the grievant be denied and that his discharge be upheld.

EMPLOYEE OCCUPATIONAL INJURY OR ILLNESS REPORT

United Parcel Servic

Employee

FIRST NAME: William | INITIAL: T. | LAST NAME: Mitchell

ADDRESS: 431 Woodley Ave.

CITY & STATE: Staten Island N.Y. | ZIP CODE: 10314 | TELEPHONE (Area) 212 (No.) 698-8275

SOCIAL SECURITY NUMBER: 062 30 0260 | ☒ MALE ☐ FEMALE | ☐ SINGLE ☒ MARRIED | NUMBER OF DEPENDENTS: 4

DATE OF BIRTH: 2/16/39 | DATE OF EMPLOYMENT: 12-7-73 | WAGES: Per Day $ ____ Per Hour $ 6.67

REGULAR OCCUPATION: Pkg Wagon | OCCUPATION AT TIME OF INJURY OR ILLNESS: Package car

For Office Use Only

U.P.I. REPORT NUMBER: C607014

INSURANCE COMPANY FILE NUMBER:

DISTRICT NUMBER:

CENTER DEPT. LOCATION NO.:

INJURY OR ILLNESS CODE NUMBER: 11

BODY PART CODE NUMBER: 5

Accident or Exposure

WHERE DID INJURY OR ILLNESS OCCUR? (Specify in center, etc., or address if not U.P.S. property) Inside building U.P.S. property 1321 Travis Ave. S.I. N.Y. 10314.

HOW DID INJURY OR ILLNESS OCCUR? (Describe fully) Checking oil in truck #55507 slipped on stuff on floor exiting truck falling + the ground substaining back injuries

WHAT WAS EMPLOYEE DOING WHEN INJURED? (Be specific) Exiting truck, slipped and falling to the ground

NAME OBJECT OR SUBSTANCE WHICH DIRECTLY INJURED THE EMPLOYEE: Floor of Building

Date of Injury: 7/14/76 | Time of Injury: 12:15 ☐ AM ☒ PM | Starting Time Day of Injury: 11:30 ☐ AM ☒ PM | Was Employee Paid for Full Day: Yes | Date Disability Began: / /

WHEN AND TO WHOM WAS INJURY REPORTED? Reported to Supervisor who reported it to Pillow

WITNESSES: Name & Address: None.

Nature

☐ Head ☐ Eyes ☐ Trunk Middle Back ☐ Arms Both | ☐ Hands ☐ Legs ☐ Toes ☐ Internal | ☒ Wounds ☒ Strain & Sprain Middle Back ☐ Hernia ☐ Fracture | ☐ Dog Bite ☐ Burns ☐ Foreign Body ☐ Skin | ☐ Death ☐ Lost Time ☐ Medical Treatment Only | ☐ Delayed Medical Treatment

DESCRIBE INJURY OR ILLNESS (Specify right, left, etc.): Strain of middle Back

Medical Treatment

BY	Name	Address	Telephone Number
HOSPITAL			
HOSPITAL			
DOCTOR	D. Agnifredda	212 Cromwell Ave S.I. N.Y.	YU-7-4805
DOCTOR			

HAS EMPLOYEE RETURNED TO WORK: No | DATE RETURNED: / /

REMARKS: Employee injury was reported to Walter Pillow, Supervisor. Walter and Bill Pillow the only employees in the building at the time of injuries. Supervisor came in the next day to Bill's residence.

As certified that the above statements are true:

Date 7/14/76 CENTER St. Island EMPLOYEE'S SIGNATURE William Mitchell

Date 7/14/76 CENTER St. Island CENTER MANAGER Bill Pillow

DISTRICT ADDRESS

EXHIBIT B

Exhibit B

A53

Exhibit C

January 28, 1977

Mr. William Mitchell
431 Woolley Avenue
Staten Island, New York 10314

Dear Mr. Mitchell:

A meeting was held in the Staten Island Center on January 13, 1977. Present were you, Local 177 officials Joe Purcell and Don Mason, shop steward Harry Stanley, Ray Cooper, Lou Pillerella, Nick Melillo, Brian Flynn and myself.

The purpose of the meeting was quite specific. We reviewed with you the fact that on numerous instances, you were observed leaving the job prior to the completion of your work day. In an effort to conceal this, you falsified your time cards. Your acts were ones of dishonesty and constitute a complete dereliction of your responsibilities as an employee.

When confronted with these facts you denied them completely and your only explanation was that the charges against you were lies and we were out to get you. You made these comments in spite of the fact that several supervisors observed you on different occasions leaving the job.

We mentioned that we could not tolerate dishonesty from any of our employees.

As a company, we provide you with substantial wage and fringe benefits. For these benefits, we expect that all of our employees be honest with us and provide us with a fair days work.

We made it quite clear to you that you have left us no choice in this matter. Your dishonest acts cannot be tol-

PREVIOUS PAGE WAS BLANK

erated by United Parcel Service. Based on all these facts presented at this meeting, we have no choice but to discharge you from our employ.

Very truly yours,

UNITED PARCEL SERVICE
JIM KILKENNY
Jim Kilkenny
DIVISION MANAGER

JK/vac

cc: B. Pastor
J. Kilkenny
Local #177
Personnel

Exhibit D

UNITED PARCEL SERVICE

EASTERN STATES IBT

AREA AGREEMENT

December 9, 1976

Article 6

Grievance Procedure

Section 1—*No Strikes—No Lockouts*

The Union and the Employer agree that there shall be no strike, picketing, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement or any Supplement hereto, of any controversy which might arise under this Agreement. The parties further agree that the words "legal proceedings" as used in this paragraph shall not be construed to prohibit the Union or the Employer from going to court of proper jurisdiction for an injunction against the other for breach of the no-strike, no lock-out, no tie-up, no picketing promises made herein.

Section 2—*Grievances*

A grievance is hereby jointly defined to be any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this agreement or Supplements hereto.

Grievance procedures may be invoked only by authorized Union representatives.

In the event of a grievance, it shall be handled in the following manner.

(a) The employee shall report it to his shop steward in writing within five (5) working days. The steward shall attempt to adjust the matter with the supervisor within forty-eight (48) hours.

(b) Failing to agree, the shop steward shall promptly report the matter to the Union which shall submit it in writing and attempt to adjust the same with the Employer within five (5) days.

(c) If the parties fail to reach a decision or agree upon a settlement in the matter, it shall be submitted in writing within ten (10) working days unless otherwise mutually agreed, to:

(1) The appropriate Local Parcel Grievance Procedure as set forth in each supplement if it is a grievance relating to a Supplemental Agreement or a matter not relating to the interpretation or application of the Area Agreement or appeal from discharge or suspension.

(2) The Eastern States Area Parcel Grievance Committee as set forth in Section 5 (hereinafter referred to as the ESAPGC) if it is a grievance relating to the interpretation or application of the Area Agreement.

(3) In the event there is a dispute as to whether a grievance should be heard by the Local Procedure or the Area Committee, the matter shall be referred to the Area Committee for a determination of which committee has jurisdiction.

Section 3—*Eastern States Area Parcel Grievance Committee*

A. The ESAPGC shall be composed of the UPS representatives and the Union representatives who served on the Negotiating Committee or their replacements as may be agreed upon by the Negotiating Committee.

B. The expenses incurred by the ESAPGC shall be borne equally on a pro rata basis by all the Local Unions having cases docketed on the agenda and UPS operations which are covered by this Agreement.

C. In order that ESAPGC may operate quickly and efficiently, the parties agree that a person who may or may not be a member of the ESAPGC shall be mutually selected and designated to serve as Secretary. The Secretary, if not a member of the ESAPGC, shall have no voice in making decisions and shall perform only the duties assigned to him by the ESAPGC. The Secretary shall docket cases, prepare the agenda and mail all copy prior to the scheduled meeting of the ESAPGC to each member of the Committee and the Employer. The Secretary shall attend the meetings to prepare and keep the minutes and mail copies of the minutes to the members of the ESAPGC and shall also mail copies of the decisions of the ESAPGC to all UPS representatives and Local Unions who are parties to this Agreement.

D. A grievance to be heard by the ESAPGC must be put in writing and submitted to the Secretary ten (10) days before the meeting of the ESAPGC. The parties further agree that no grievance or grievances shall be discussed except those which have been received by the Secretary of the ESAPGC before the ten (10) days prior to the date of the meeting. It is agreed that there shall be an equal number of representatives of the Unions and UPS on each panel that hears a case. The members of the panel are to be selected from the overall ESAPGC. The decision of the majority of the panel hearing the case shall be binding on all parties.

E. It is understood and agreed that the UPS representatives and the Local Union representatives of the ESAPGC representing the UPS operation and/or Local Union involved in a proceeding before the panel will be ineligible to act as a member of the panel during the proceeding.

Section 4—*Arbitration—ESAPGC*

If any grievance or dispute cannot be satisfactorily settled by a majority decision of the panel of the ESAPGC,

then the grievance may be submitted to the Permanent Arbitrator, established in accordance with the ESAPGC Rules of Procedure, by either or both parties within five (5) days. It is agreed that the arbitrator is empowered to hear and decide the deadlocked case even if only one of the parties submits to arbitration or if one of the parties fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to apply the provisions of this Agreement and to render a decision on any grievance coming before him, but shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement. The cost of the arbitration shall be shared equally by the parties. The decision of the arbitrator shall be final and binding on the parties and the employees involved. In the event that the losing party fails to abide by the arbitrator's decision or that either party refuses to submit to his jurisdiction, the other party shall have the right to take all legal or economic recourse. The ESAPGC or the arbitrator shall have the authority to order full, partial or no compensation for time lost.

Section 5—*Approval by Eastern Conference*

Before any strike or stoppage of work takes place over a grievance or interpretation arising out of this Agreement or Supplements hereto that cannot be settled in accordance with the grievance machinery as set out in this Agreement, there must be approval by the International Director of the Eastern Conference of Teamsters or his duly authorized representative, with notice of such approval to be given to the Employer, in writing, prior to such a strike or stoppage of work. The granting of such approval by the Eastern Conference of Teamsters shall not impose any liability on said Conference.

Section 6—*Illegal Strikes*

It is further mutually agreed that the Local Union will, within two (2) weeks of the date of the signing of this Agreement, serve upon the Employer a written notice which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work in a case where a strike or stoppage is authorized under this Agreement, and the Union shall not be liable for any activities unless so authorized.

It is agreed that in all cases of unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from any unauthorized action of its members. While the Union shall promptly undertake every reasonable means to induce said employees to return to their jobs during such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer shall have the sole and complete right of discipline, including the sole and complete right to discharge any employee participating in any unauthorized strike, slowdown, walkout or any other cessation of work and such employee shall not be entitled to have any recourse to any other provision of this Agreement.

Section 7—*Examination of Records*

The Local Union Business Agent shall have the right to examine time sheets and any other records pertaining to the computation of compensation or fringe benefits of any employee whose pay is in dispute or records pertaining to a specific grievance.

Section 8—*Health, Welfare, and Pension Contributions*

A. Notwithstanding anything herein contained, it is agreed that in the event the Company is delinquent at the end of a period in the payment of its contribution to the Health and Welfare or Pension Fund or Funds created under this Agreement or Supplements hereto, in accordance with the rules and regulations of the Trustees of such Funds, the employees or their representatives, after the proper official of the Local Unions shall have given seventy-two (72) hours notice to the Company of such delinquency in Health and Welfare or Pension payments, shall have the right to take such action as they deem necessary until such delinquent payments are made and it is further agreed that in the event such action is taken, the Company shall be responsible to the employees for losses resulting therefrom.

B. It is mutually agreed that all monies due and owing under the Health and Welfare and Pension provisions of this Agreement or Supplements hereto shall be considered as wages and collectible as such.

UNITED PARCEL SERVICE
EASTERN STATES AREA AGREEMENT
NEW JERSEY SUPPLEMENT

December 23, 1976

GRIEVANCE AND ARBITRATION

The parties agree that the Local Parcel Grievance Procedure referred to in Article 6, Section 2(c)(1) of the Eastern States IBT Area Agreement shall be as follows:

Section (1)

Employees shall have the shop steward present on any grievance.

Section (2)

(a) The A. A. P. G. C. shall be composed of United Parcel representatives and one representative from each of the Local Union Nos. 22, 28, 29, 61, 71, 171, 175, 177, 322, 355, 391, 453, 505, 509, 539, 623, 639, 697, 789, 822, 876 and 992. The expense incurred by the A. A. P. G. C. shall be borne equally by all the Local Unions on a pro rata basis for the Local Unions having cases docketed on the agenda and United Parcel operations which are covered by this Agreement.

(b) In order that the A. A. P. G. C. may operate quickly and efficiently, the parties agree that a person who may or may not be a member of the A. A. P. G. C. shall be mutually selected and designated to serve as Secretary. The Secretary, if not a member of the A. A. P. G. C. shall have no voice in making decisions and shall perform only the duties assigned to him by the A. A. P. G. C. The Secretary shall docket cases, prepare the agenda and mail a copy, prior to the scheduled meeting of the A. A. P. G. C. to each member of the Committee, the Employer, and Local Unions whose case appears on the agenda. The Secretary shall attend the meetings to prepare and keep the minutes and mail copies of the minutes to the members of the Committee and shall also mail copies of the decisions to the A. A. P. G. C. to all United Parcel Service,

Inc. representatives and Local Unions who are parties to this Agreement.

(c) A grievance to be heard by the A. A. P. G. C. must be put in writing and submitted to the Secretary seven (7) days before the meeting of the Joint Area Grievance Committee. The parties further agree that no grievance or grievances shall be discussed except those which have been received by the Secretary of the A. A. P. G. C. before the seven (7) days prior to the date of the meeting of the A. A. P. G. C. It is agreed that there shall be three (3) representatives of the Unions and three (3) representatives of United Parcel Service on each panel that hears a case. The members of the panel are to be selected from the overall A. A. P. G. C. The decision of the majority of the panel hearing the case shall be binding on all parties.

(d) It is understood and agreed that the United Parcel representatives and the Local Union representatives of the A. A. P. G. C. representing the United Parcel Service operation and/or Local Union involved in a proceeding before the panel will be ineligible to act as a member of the panel during the proceeding.

(e) It is agreed that all grievances pertaining to matters described in this Article must be referred to the A. A. P. G. C. It is further agreed that all discharge cases be docketed first on the agenda.

Section (3)

If any grievance or dispute cannot be satisfactorily settled by a majority decision of the panel of the A. A. P. G. C., then the grievance shall be submitted to the Federal Mediation and Conciliation Service by either or both parties within five (5) days. It is agreed that the arbitrator is empowered to hear and decide the deadlocked

case even if only one of the parties submits to arbitration, or, if one of the parties fails to appear at the hearing or to present evidence. The arbitrator shall have the authority to apply the provisions of this Agreement, and to render a decision on any grievance coming before him, but shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement. The cost of the arbitration shall be shared equally by the parties. The decision of the arbitrator shall be final and binding on the parties and employees involved. In the event that the losing party fails to abide by the arbitrator's decision, or that either party refuses to submit to his jurisdiction, the other party shall have the right to take all legal or economic recourse.

Exhibit E

February 15, 1977

Teamsters Local #177

vs.

United Parcel Service

Case No. 874
Type—Discharge
Employee—William Mitchell
Center—Staten Island, New York

Gentlemen:

On January 8, 1977, Mr. William Mitchell was put on a notice of discharge for stealing time and falsifying Company records. On January 13, 1977, a hearing was held at the Staten Island Center and the company presented their facts about Mr. Mitchell's assumed misconduct. The union's position was that if indeed Mr. Mitchell did what the company said he did, he was only doing what had been past practice and was done with company consent. On Friday nights the company allows our members to go home four hours undertime and pays them for eight hours. They also let Local 177 people lock the building because there are no supervisors with them. If the company managers consent to this type of activity, then it must be assumed that they will tolerate other types of misconduct. This local union feels that Mr. Mitchell, if he committed the acts, should have been warned to stop what he was doing. This union also strongly feels that Mr. Mitchell should not have been fired.

We respectfully request that the claim of the union be upheld. Attached is Mr. Mitchell's own statement of facts.

Attachment

Jan. 19, 1977

Summary of the events leading to the dismissal of William Mitchell, Carwasher, S. I. center.

Dear Mr. Purcell,

Begining in 1969 I became the carwasher at the S. I. center at which time the company policy was to turn the building over to me when I arrived for work at 6 p.m.

For the overwhelming majority of time during the 8 yrs. 1/69 to 1/77 no representitive of management was present at this facility during the hrs. of 6 p.m. to 7 a.m. during the period from 1/69 to 1/77 supervisors have been assigned to the center to observe the operation. These activities included; prolonged T. V. watching, the repair of private autos, trips to various establishments off the company property to secure refreshments, and various other activities unrelated to the employees function at U. P. S. These activities were observed, approved of by and activly joined into by every manager or supervisor that ever stayed at night for a period of at least 3 yrs. The people who have obeserved this situation include Louis Pillarella manager, who at one time left his private automobile in the care of one of the carwashers for the purpose of performing repairs on it. This epesoide was admitted to by Pillarella.

Other witnesses include: N. Mellillo, B. Flynn, B. Main, L. Weeks, J. Sardella, K. Swier all supervisors.

During the protrated periods of time I was left unsupervised management accepted my performance as being entirily satisfactory. During the tenure of Pillarella as manager presure has been placed on all inside employees to deliver parcels. The work of these psedo-deliverymen has then been credited to the regular drivers to achieve a apperance of superiour "on road time". I as carwasher

however, refused to capitulate to these ileagle demands and a policy of harassment was begun, whitch failed. These harassments included, but where not limited to, a company effort to have me terminated because the engine in a 17 yr. old truck failed, obstenibly because of low oil reserves; the remaining fleet was check for this condition and it was found not to exist. The Union argued sucsessfully in my behalf, however, a 3 day suspension was arbitraily placed in effect. The company's position at this time was," to accept the suspension or take it to arbitration," in whitch case a 3 mounth de-facto suspension would have resulted. The 3 day's were acceped under protest.

All other atempts at coersion failing, and apparently honoring a commitment made to the company, a conspiricy was entered into by management to charge the carwasher with a sudden case of "leaving the building". The idea to charge "leaving the building" was instigated by events whitch took place on the night of 7/8/76. After punching out and entering my automobile to go home I was forcibly restrained on company property by 3 men including the manager, Pillarella, and forced to remaine in this confined status for a period of at least 20 min. After producing my time card apoligies were made and I was alowed to leave. The next day however, I was informed that I was being dissmissed for actions proporitly observed by supervisors on previous occasions.

In the hearing that followed management attempted to prove thier positition by offering that I had seriptisisly left the building by offering written statements to that effect.

I vigorisly denied the charge and challenged the company to produce some proof other than thier supervisors unsubstanciated statements. The company's answer was that thier supervisors word was good enough. It seems resonable to assume that when management is accusing

an employee of being a "thief and embezzeler," irrevocable evidence should be the order of the day. To allow the company to remove from thier employ a man with 13 yrs. seniourity just by vitue of thier collective statements would be lending credibilty to a premise that would efectivly distroy our integrity as human beings.

In discribing some of the events which have taken place during my 7 yrs. as carwasher on S. I. I am only trying to put the events which led to my dismissal in thier proper context. I am guilty however of allowing myself to achieve a feeling of false secuity by permiting management, many times, to work outside the barganing agreement. For ex. loading the missed pieces into a truck at managements suggesttion and bringing them to a truck making pickups because of a impending audit. This example corecttly shows managements attitude in regards to rules.

I do offer this statement to be a true and accuate account of the information contained herein.

Respectfully yours,

/s/ William Mitchell

[Notarial Stamp]

Exhibit F.

Feb. 16, 1977

Mr. Frank Fitzsimmonds, President
I. B. T.
25 Louisiana Ave. N. W.
Washington, D. C.

Dear Mr. Fitzsimmonds

My name is William Mitchell an employee of United Parcel Service in Staten Island N. Y. A situation has developed here whitch I hope will merit your attention. I've been discharged and been called a "thief and embezzler" by James Kilkenny a division mgr. for U. P. S. in central N. J. The company offered no proof of these charges other than the statements made by thier supervisors. I've enclosed correspondence between myself and the company to futher explain the situation.

Local #177 to which i've been a membe of for 13 years has done a excellent job in protecting my rights under the contract.

Joe, Purcell and Donald Mason B. A.'s for the local have done a tremendous job in my behalf. However because of the company's unresonable position i've been compelled to hire a atornney to protect my civel rights.

Due to the sever fincial hardships placed upon me by U. P. S. I feel I must turn to the International for financial assistance to fight this miscarridge of justice, which, if left unchallenged, will give U. p. S. the leagel precident there looking for to terminate unwanted senority employee's merely by vitue of thier unsubstanciated charges.

Any consideration vou can give this matter will be greatly appreciated by myself and my family and by stop-

ping this attempt by U. P. S. to get rid of good union men by any possible method you will be reaffirming the rights of every member of our union to protect themselves from the malacious atempts by this company to destroy any employee who they feel has outlived thier usefullness.

I'me hoping this letter finds you and your family in excellent health.

REspectfully yours,

/s/ WILLIAM MITCHELL

Exhibit G

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Established in accordance with the terms and conditions of the Atlantic Area Parcel Agreement, entered into by and between the several Local Unions and United Parcel Service, Inc.

Docket No. 874

IN THE MATTER OF THE DISPUTE BETWEEN

Teamsters Local #177, Irvington, N. J.
(City and State)

and

UNITED PARCEL SERVICE, INC.

SUBMISSION

We, the undersigned, parties to the Atlantic Area Parcel Agreement, hereby agree to submit the following dispute for a decision under the Rules of Procedure prescribed by the Atlantic Area Parcel Grievance Committee, by virtue of its authority, as set forth in Article 7 of the Atlantic Area Parcel Agreement.

> On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated with full back pay.

The undersigned further agree that a majority decision of the Joint Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 7 of the Atlantic Area Parcel Agreement.

Date: 2-16-77
Employer: United Parcel Service, Inc.
Signed by: William Pastor
Title: District Manager
Local Union: 177
Signed by: Joseph Purcell
Title: Business Agent

DECISION

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

Frank Feely
Employer Co-Secretary

2-16-77
Date

Al Barlow
Union Co-Secretary

2-16-77
Date

AFFIDAVIT OF WILLIAM MITCHELL SWORN TO JULY 17, 1979 IN OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION AND EXHIBITS ANNEXED THERETO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM MITCHELL, being duly sworn, deposes and says:

I am the plaintiff in this action, and am making this affidavit in opposition to the summary judgment motion of the defendants United Parcel Service, Inc. (hereinafter "UPS") and International Brotherhood of Teamsters,

Chauffeus, Warehousemen and Helpers of America (hereinafter "International Brotherhood"). It is my understanding that the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (hereinafter "Local #177") has not moved for summary judgment.

In 1964, I was first employed by the defendant UPS.

On January 13, 1977, I was advised by James Kilkenny, a UPS Division Manager, that I was being discharged for alleged dishonesty, and was provided with a letter to that effect on January 28, 1977 (See Exhibit "C" annexed to the Kilkenny affidavit).

The reason that I was discharged was that I had allegedly been "stealing time," that is, requesting payment for hours which I had allegedly not worked. The dates for which I had allegedly sought to be paid and submitted a time card setting forth certain hours, when in fact I allegedly had not worked those hours, were June 16, 1976, June 18, 1976, June 28, 1976, June 29, 1976, July 1, 1976, July 6, 1976, July 7, 1976, and July 8, 1976.

The basis for the UPS charges against me was that certain other UPS employees who had been directed to spy upon me by UPS, had allegedly seen me leaving work or they had not seen me being present at work during certain hours for which I had submitted time cards indicating that I had been working and should be paid for.

UPS did not explain how I could possibily not have been present on the job when the time cards which I submitted clearly showed that I had clocked in and out on the UPS time clock at the Staten Island facility where I was employed, on certain dates and times.

In order to support their totally unfound charges against me, UPS took the position that I had "found some way to tamper with the time clock." In fact, I have never

tampered with the time clock, do not know how to tamper with the time clock, and there is absolutely no evidence or testimony that I was ever seen tampering with the time clock or even loitering in the area of the time clock. The sole basis for the statements that I must have tampered with the time clock, is that certain UPS employees did not see me working when I should have been, and accordingly the conclusion was reached that therefore my time card must have been falsified and I must have tampered with the time clock in order to have my time card reflect the hours which it did.

From the very first time in July of 1976 when I was advised that UPS was claiming that I had tampered with the time clock and was "stealing time," I vigorously denied all of the charges and requested an opportunity to confront the persons who claimed I had not been present at work for the hours reflected on my time card.

Pursuant to the agreement between the Union of which I am a member, Local #177, and the UPS, I was to be advised of the charges against me before being discharged.

I was advised that Mr. Kilkenny would be present at the Staten Island facility and advise me of the charges against me some time in July of 1976. Due to the fact that either Mr. Kilkenny was unavailable or because the Union representatives were unavailable, the original date for a meeting in July of 1976 was cancelled.

I have read the Kilkenny affidavit, and Mr. Kilkenny attempts to mislead this court into believing that the initial July 1976 meeting to inform me of the charges was cancelled because I was injured on a job prior to that date. This is false.

Mr. Purcell, the Union representative and business agent, testified under oath during his deposition that the reason the initial meeting was adjourned was because

someone couldn't make it (Pages 28-29 Purcell deposition), that someone being someone other than myself.

Thereafter, the meeting was scheduled for July 14, 1976. Unfortunately, on that morning I was injured at work, and was disabled for the next five months. Here again, Mr. Kilkenny attempts to insinuate that my injury was feigned in order to avoid having the meeting where I would be informed of my discharge. This is likewise misleading. It was I who requested to return to work, and it was the UPS doctor who consistently would not permit me to go back to work until December of 1976.

Shortly after I returned to work, I was advised that the meeting with regard to my alleged stealing of time would be held on January 13, 1977. Throughout his affidavit, Mr. Kilkenny refers to this meeting as a "hearing." There was no "hearing" of any nature whatsoever. In fact, UPS refused to provide me or the Union with any charges or even copies of the time cards which were allegedly false prior to this January 13, 1977 meeting.

In his affidavit of June 4, 1979 in support of the summary judgment motion, Mr. Kilkenny states (Paragraph # 7):

> "After hearing and considering the union's arguments on Mr. Mitchell's behalf, I then informed Mr. Mitchell that his dishonest and irresponsible behavior necessitated that we terminate his employment with UPS."

In fact, Mr. Kilkenny had decided prior to the meeting that I was to be discharged, and the meeting was simply an exercise of futility. Any statements by Mr. Kilkenny that he considered the matters which were brought up at the January 13, 1977 meeting before deciding to discharge me, are misleading. During his deposition in this case, Mr. Kilkenny testified as follows (Pages 27-28):

"Q. Who had made the determination that Mr. Mitchell was to be discharged at this hearing?

A. I made the determination.

Q. Had you made the determination prior to the meeting?

A. Well, he was physically discharged at the hearing.

Q. Had you made the determination that he was to be discharged prior to the meeting?

A. Well, I guess I had. After looking at all the evidence I was fairly determined that Mr. Mitchell was going to be discharged. I couldn't think of anything that would have come up at the hearing to change my mind, but we had the hearing.

Q. You say you "had the hearing." You mean you went through the motions?

A. We had the hearing and listened to Mr. Mitchell.

Q. And Mr. Mitchell said he did not do it?

A. Yes, he did.

Q. And at the end of the meeting you told him he was discharged?

A. I told him—I don't know if it was at the very end of the hearing, but I told him that he was going to be discharged."

Thereafter, I was notified in writing that I was discharged.

In preparation for this meeting on January 13, 1977, Mr. Purcell admittedly did next to nothing. According to Purcell's own testimony, he was involved in contract negotiations in Washington, so that he did not have time to investigate the matter (Page 29, Purcell deposition). Although Mr. Purcell and the Union had more than six months to investigate the charges against me between July

of 1976 and January of 1977, they did nothing during this entire period (Page 30, Purcell deposition). They made no demand for a specification of charges before the January, 1977 meeting (Page 33, Purcell deposition), and Purcell obtained no information from the shop steward, Harry Stanley, before the January, 1977 meeting (Page 35, Purcell deposition).

The Union also did nothing to check out the time clock to determine whether it was working properly (Page 36, Purcell deposition), nor did they request to examine the time cards (Page 38, Purcell deposition).

Understandably, since the Union did nothing to prepare for the meeting and UPS had already determined that I was to be discharged before the meeting even took place, I was discharged immediately following the January 13, 1977 meeting.

I was advised that the Union would file a grievance on my behalf and Purcell advised me that he would inform me when the grievance hearing was to take place.

At that same time, I advised Mr. Purcell that two other UPS employees, Donald Endriss and Walter Murray, could be my witnesses at the grievance hearing.

I thereafter heard nothing at all from Mr. Purcell about when the grievance hearing would take place until February 14, 1977, at approximately 12:15 in the afternoon. On that day, I received a telegram advising me that the grievance hearing was to take place in Virginia Beach, Virginia on February 16, 1977, and that if I wish to attend, I must assume all my expenses (a copy of that telegram is annexed hereto as Exhibit "A").

Upon receipt of the telegram, I immediately called the Union Local and asked if the meeting could be adjourned from February 16, 1977 for several reasons:

a. I could not possibly get to Virginia by February 16, 1977 without funds;

b. I could not possibly prepare my case or obtain witnesses on such short notice;

c. I wanted to consult with counsel; and

d. I had applied for welfare so that my family could eat, and had an appointment at the welfare office on that day.

I further advised the Local that if they could not adjourn the hearing, then at the very least, they should supply me with the funds so that I could get to the hearing in Virginia.

Up to the time I had received the telegram advising me that the hearing would be in Virginia, I had always expected that the hearing would be held in the New York area or in Newark, New Jersey, so that I could attend.

I was advised by the Union that there was nothing they could do for me.

Thereafter, I was advised by the Union that my discharge had been upheld in Virginia and "that's the way it goes."

I requested a copy of the minutes so that I could determine what had transpired in Virginia and was advised that I could not have a copy but that I would have to hire a lawyer and subpoena them.

When my lawyers finally obtained a statement of what had occurred in Virginia, it became clear to me why the Union had refused to provide me with a copy of the minutes. A copy of the minutes is annexed hereto as Exhibit "B."

As can be seen from a review of Exhibit "B," my interests were never properly represented by the Union and their defense was absurd, contrary to my position, and non-existent for all practical purposes.

Commencing on Page 46 of the minutes, Mr. Purcell allegedly represented my position.

From the very first time that the charges were brought I persistently advised Mr. Purcell that I had not been guilty of stealing time and that the charges against me were false. Mr. Purcell did not obtain any witnesses or even attempt to or ascertain whether the time clock was operating properly, but rather represented to the panel that in fact I was guilty as charged by the company, but that my alleged misconduct was acceptable because of the company's policy in the past, and that therefore I should not have been fired but warned to stop what I was doing.

As can be seen, the Union's position admitting that I had been guilty of stealing time is totally contradictory to my statement which I had supplied to Mr. Purcell at his request.

What makes the situation even more absurd is that after admitting that I had been guilty of the misconduct alleged by UPS, the Union then read my statement to the panel, advising them that I was not guilty of the charges.

Understandably, after my own Union had admitted that I was guilty of stealing time, but was simply pleading for a lesser penalty, the panel upheld my discharge.

Annexed hereto as Exhibit "C" is a copy of the pre-hearing statement, filed by the Union on my behalf, which admits that UPS is correct and that I was stealing time, but simply pleads for a lighter penalty.

After receiving a statement of this nature from my own Union, the panel necessarily would discharge me.

When one compares the statements submitted by the Union allegedly on my behalf with my own statement that I was not guilty of anything, it can readily be seen that the Union did not represent me at all, but in fact undercut any possible chance I would have had in front of the panel by stating to the panel that I had allegedly been guilty of stealing time.

It should also be noted that the Union did nothing to obtain any witnesses for me or to obtain any statements from witnesses.

I had told Mr. Purcell that Endriss and Murray could be witnesses for me and yet Mr. Purcell to my knowledge did not attempt to obtain a statement from any of these witnesses.

Mr. Purcell admits that he did not even attempt to interview any of the company's witnesses who alleged they had seen me stealing time (Page 83, Purcell deposition), and that he did not attempt or get copies of the statements given by any of the UPS personnel of what I was being charged with (Page 84, Purcell deposition).

Purcell never even asked to see the time cards which I had been alleged to falsify, since he "assumed he would be turned down" (Page 115, Purcell deposition).

Following my discharge, I continuously called Purcell and requested to be told when the grievance would take place and Purcell had promised to inform me as soon as he knew.

Admittedly, Purcell knew that the grievance would be held in Virginia Beach, Virginia by the 10th of February (Page 69, Purcell deposition), but did nothing to inform me until February 14, 1977 at noon.

Had I been given an adequate opportunity, I could have come to Virginia and could have brought my witnesses, specifically, I had contacted both Endriss and Murray and asked them if they would testify at my grievance hearing and they had said yes.

Purcell did not even ask me to obtain statements from the witnesses, but only requested my own statement and I was not told that my statement would be presented to the panel, but thought that it was for Purcell's own purposes.

The extreme importance of my having been at the panel in Virginia is demonstrated by the fact that Kilkenny is compelled to admit that the panel members asked Purcell where I was. The following colloquy occurs during Mr. Kilkenny's deposition (Page 51):

"Q. Did any panel member ask you where Mr. Mitchell was?

A. No, he did not.

Q. Did you hear any panel member ask Mr. Purcell or Mr. Pastor where Mr. Mitchell was?

A. I believe Mr. Purcell was asked whether the grievant was present.

Q. Who asked him that?

A. Which member of the panel I don't know.

Q. But it was one of the panel members?

A. Yes.

Q. What did Mr. Purcell say?

A. I don't remember his exact words but he told them he wasn't there.

Q. Did Mr. Purcell tell the panel why he was not there?

A. I don't recall.

Q. Did the panel ask Mr. Purcell if he had any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

Q. Do you know if Mr. Purcell introduced any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

Q. Was it permissible to have witnesses at this hearing?

A. Yes.

Q. And UPS had brought down several witnesses, had they not?

A. The company had brought several people that would have been available to—

Q. To testify?
A. To testify, if they were needed."

The foregoing testimony also shows that UPS had witnesses at the hearing, while I was not present and with the Union admitting that I had allegedly stolen time, I could not help but lose the hearing and be discharged.

Purcell, during his deposition, admits that the Union obtains dues of approximately $500,000.00 a year (Page 6, Purcell deposition), and promised to provide my attorneys with a statement of the Union's assets in February of 1977, but has not done so (Page 8, Purcell deposition). Purcell also admits that the Union paid for his transportation and room, and in addition, provided him with $50.00 per day for food and incidentals (Page 13-16, Purcell deposition).

Your deponent suggests that the Union had a duty to properly and fairly represent your deponent by making it possible for him to attend the grievance hearing where I was to be discharged from a job which I had held for over thirteen years.

Following my discharge from the Union, I was desparate and wrote the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "International Brotherhood"), requesting or begging for their aid and assistance, hoping to attain some assistance from the International Brotherhood. I naturally advised the International Brotherhood that Joseph Purcell and Donald Mason, the Local's business agents, had done a tremendous job on my behalf. In fact, the job performed by Mr. Purcell and Mr. Mason was abysmal and they provided me with no representation or defense. Their purported defense was directly contrary to what I had informed them was the fact, that I had not stolen any time and was completely contrary to my sworn statement submitted to the panel, so that in essence I was pleading not

guilty and guilty at the same time and was assured of being discharged from my position.

A fair hearing would require that I be given reasonable notice to attend that hearing, at the very least the Union request an adjournment, which Mr. Purcell admits he did not even know if he could do (Page 87, Purcell deposition) and did not even bother to seek an adjournment, but simply submitted a perfunctory statement to the panel on my behalf which directly contradicts the facts as I had advised the Union.

The importance of my not being able to attend the hearing is underscored by the fact that the panel requested to know where I was, since obviously if I did not bother to attend, I could not have a very good defense.

After I was discharged, the Union did nothing at all to attempt to aid or even attempt to obtain another position for me. When I wrote to the International Brotherhood, I was simply brushed off.

The statements made in the Kilkenny affidavit that I refused to exhaust my Union remedies and therefore I should not be permitted to bring this action, are misleading. To my knowledge, and so far as I am aware, although having been a member of the Union for thirteen years, there are no intra-union remedies which were available to me. Exhibit "H" annexed to the Kilkenny affidavit which purports to provide an intra-union remedy, is misleading. It was my understanding that that only deals with penalties against Union officials for various charges set forth on Page 123 *et seq.* of Exhibit "H." Those intra-union remedies do not and cannot apply to an unfair representation claim, since what possible remedy can an internal Union trial possibly provide to get me restored to my position.

It was my understanding that the intra-union remedies apply to situations where an employee had a grievance against a Union member or official with regard to conduct

which the Union could cure and that it would be futile to seek an intra-union remedy when the Union could not possibly aid me once I had been discharged, because they failed to properly represent me.

In short, after paying dues to the Union for thirteen years and being prevented from obtaining counsel or seeking a legal remedy against UPS because of the agreement between the Union and UPS, I was denied an opportunity for a hearing or to be heard when I was to be discharged from my job.

The Union's efforts on my behalf were less than perfunctory, but were completely contrary to the facts as related to them, and sabotaged whatever chance I might have had to have the panel restore me to my position.

Coupled with the fact that I did not have adequate notice of the hearing, did not have an opportunity to seek witnesses, the Union's failure to obtain any witnesses for me or provide me with funds to get to Virginia, make it clear that my rights were not protected by the Union and I have a right to maintain this action against the Union and UPS for unfair representation and an improper discharge from employment.

Whether I win my case will depend on proof at the trial, but at the very least I deserve an opportunity to finally be heard and not be discharged because UPS claims that I must have devised a way to tamper with the time clock, although submitting no proof of that and which allegation I vigorously deny.

What the defendants are seeking here is to simply prevent me from ever having a fair hearing or day in court, and this they should not be permitted to do.

WHEREFORE, it is respectfully requested that the defendants' motions for summary judgment be denied in all respects.

/s/ WILLIAM MITCHELL
William Mitchell

Sworn to before me this 17th day of July, 1979.

DAVID JAROSLAWICZ
Notary Public
David Jaroslawicz
Notary Public, State of New York
No. 41-7076140
Qualification New York County
Term Expires March 30, 1980

Exhibit "A"

2013735209 TDMT Irvington NJ 41 02-14 1224P EST
PBA 015 1239P

PMS WILLIAM MITCHELL, RDM REPORT DELIVERY BY MAILGRAM, DLR
431 WOOLEY AVE

STATEN ISLAND NY 10314 (*Get Time & Signature*)

PLEASE BE ADVISED THAT YOUR GRIEVANCE AGAINST UNITED PARCEL SERVICE CONCERNING YOUR DISCHARGE WILL BE HEARD BY THE PANEL ON WEDNESDAY FEBRUARY 16 1977 IN VIRGINIA BEACH VIRGINIA IF YOU WISH TO ATTEND YOU MUST ASSUME ALL YOUR EXPENSES PLEASE ADVISE RALPH PORFORA, LOCAL 177 (1001 SPRINGFIELD AVE IRVINGTON NJ 07111)

Exhibit "B"

(Material relating to prior case deleted.)

Chairman Barlow called for *Case 874*:

Local 177 v. UPS, Staten Island, N. Y.

On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated will full back pay.

Union Panel: A. Barlow
R. Hogan
J. Sullivan

Company Panel: F. Feely
J. Foley
D. Murray

Mr. William Pastor presented the case for the Company. He presented the following statement of fact to the Committee:

William Mitchell has been employed by United Parcel Service since May 18, 1964.

On Thursday, January 13, 1977, he was discharged from United Parcel Service for his dishonest acts of stealing time and falsifying his time cards.

During his employment, William Mitchell has been a package driver, preloader, and at the time of his discharge, a car washer at our Staten Island, New York operating center. His scheduled start time is 6:30 p.m., he get a half hour for lunch and his scheduled 8 hours are up at 3 a.m.

The events leading up to his discharge are significant and bear repeating in that they show a clear pattern of his total disregard for his responsibilities as an employee. Not once, but on seven separate occasions, Bill Mitchell was observed by company supervisors leaving his job several hours prior to its completion. On each instance he turned in a time card showing in fact that he had worked 8 hours or longer.

Our first indication that he was not completing his assigned work day occurred on Wednesday, June 16, 1976. On that date, Ed Schmidl, shop supervisor, arrived at the Staten Island Center at 1:55 a.m. to work with the mechanic, Steve Giglio. When he arrived, there were four employees in the Center. Bill Mitchell was not there. Ed remained in the Center until 11:00 a.m. in the morning. Ed did not see Bill Mitchell at any time while in the center. Yet Bill Mitchell's time card for that day showed he started work at 6:30 p.m. and finished at 3:43 a.m. Mitchell was paid for 8.72 hours of work. Ed Schmidl reported what he had observed to Center Manager Lou Pillarella and told Lou he was coming back to work with the mechanic on 6/18/76 and would check on William Mitchell's presence on the job.

Mr. Pastor read the write up from Ed Schmidl and presented it to the panel. He also submitted Mr. Mitchell's time card to the panel. Mr. Pastor continued with his presentation:

On Friday, June 18, 1976, Ed Schmidl arrived at the Staten Island Center at 2:15 a.m. Upon entering the building, Ed checked it completely. William Mitchell was not there. Ed Schmidl observed the time clock until 4:30 a.m. and saw seven men use it. At no time did he see William Mitchell in the center or use the time clock. William Mitchell's time card showed a punch out time of 4:04 a.m. Mitchell was paid for 9.06 hours of work.

Mr. Pastor submitted Mr. Mitchell's time card to the panel, as well as the time cards of the other employees who reported for work. He also submitted a write up from Ed Schmidl to the Division Manager. Mr. Pastor continued with his presentation:

On Monday, June 28th at 11:00 p.m., Ken Kett, Loss Prevention Supervisor, and Kenilworth supervisor Nick Melillo arrived at the Staten Island Center. At 12:45 a.m. on June 29th, they observed Bill Mitchell leave the building. They followed Bill to his home on Woolley Avenue, which he entered. They then returned to the Staten Island Center and observed the building until 4:30 a.m. Bill Mitchell never returned to the building. He turned in a time card with a punch out time of 4:15 a.m. and was paid for 9.24 hours.

Mr. Pastor submitted the write up from the Loss Prevention Supervisor and Mr. Mitchell's time card to the panel. He continued with his presentation:

On Tuesday, June 29, Bill's time card showed a punch in date of June 29 at 6:16. His time card also showed a punch out date of June 29, 4:27 a.m. Brian Flynn saw Bill Mitchell arrive at the Staten Island Center at 6:45 p.m. on June 29 but Bill's time card as indicated above showed a punch in time of 6:16 p.m.

Mr. Pastor submitted the write up from the supervisor and Mr. Mitchell's time card, indicating his punch in time as 6:16 p.m. He continued with his presentation:

On July 1st at 10:00 p.m., Nick Melillo and Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not at the center. At 10:35 p.m., Nick Melillo entered the building and completely inspected it. Bill Mitchell was not in the building. At 11:30 p.m. they both observed Bill Mitchell return to the building. At 12:45 a.m. on July 2,

1976, they both observed Bill Mitchell leave the Staten Island building. They watched the building until 4:20 a.m. and never saw Bill Mitchell return. At 4:30 a.m. they drove past Bill Mitchell's house and his car was parked there. Bill Mitchell turned in a time card with a punch out time of 4:15 a.m. and was paid for 9.25 hours.

Mr. Pastor submitted the write ups from the supervisors and Mr. Mitchell's time card. He continued with his presentation:

On Tuesday, July 6th between 9:00 and 9:05 p.m., supervisor Brian Flynn and Loss Prevention supervisor Ray Zienowicz arrived at the Staten Island Center. Bill Mitchell's car was not on the property. At 9:30 p.m., they observed Bill Mitchell's car parked in front of his home.

Mr. Pastor stated that Mr. Mitchell lived within five or ten minutes of the Staten Island building. He continued with his presentation:

They both returned to the Staten Island Center and saw Bill Mitchell return to the building at 10:50 p.m. At 1:33 a.m., July 7th, they observed Bill Mitchell leave the building in his car. At 1:50 a.m., Brian Flynn went past Mitchell's house and saw his car there. He then returned to the center and Ray Zienowicz and himself watched the building until 3:30 a.m. Between 3:30 and 3:35 a.m., Brian Flynn entered the building and Steve Giglio, the mechanic, was the only one inside. Flynn observed the time clock until 5:00 a.m. The only people to use the clock were the four night men. Bill Mitchell turned in a time card with a punch out time of 4:09 a.m. Mitchell was paid for 9:09 hours.

Mr. Pastor submitted the write ups from the supervisors and Mr. Mitchell's time card. He continued with his presentation:

Once again, on Wednesday, July 7th, Brian Flynn and Ray Zienowicz were at the Staten Island Center at 9:00 p.m. At 12:24 a.m. on July 8, 1976, they both observed Bill leave with his car. They watched the building until 3:30 a.m. At that time, Ray Zienowicz drove to Bill Mitchell's home and saw his car parked in front of his home at 3:50 a.m. At 3:30 a.m. Brian Flynn entered the Staten Island building and observed the time clock until 5:00 a.m. The only people to use the clock were three night men. The fourth night man was late and Brian signed him in at 4:20 a.m. Bill Mitchell turned in a time card with a punch out time of 4:24 a.m. and was paid for 9.28 hours.

Mr. Pastor submitted the write ups from the supervisors, Mr. Mitchell's time card and the time card of the individual who was signed in by Brian Flynn. Mr. Pastor continued with his presentation:

On Thursday, July 8th, at 5:57 p.m., John Burnetsky, the District Auditor, who was working in the center for the day, observed Bill Mitchell punch a time card to start work. At 9:00 p.m. Ken Kett, Lou Pillarella and Ray Zienowicz arrived at the Staten Island Center. Between 9:55 and 10:00 p.m. they observed Bill Mitchell leave the building in his car. They drove to Mitchell's house where he arrived at 10:20 p.m. They then returned to the Staten Island Center. At 11:30 p.m. Mitchell returned to the Center. At 12:25 a.m. on July 9th, Bill Mitchell left the building and started to drive away. At that time, he left the building and started to drive away. At that time, he was confronted by Lou Pillarella and Ken Kett. When asked where he was going, Bill Mitchell replied, to lunch. He was then asked where he had been from 9:55 to 11:30. He replied he had gone home for an emergency. Center Manager Lou Pillarella then asked to see his time card.

Bill handed him a card with just a punch out time of 12:35 on it. He asked Bill why he had not punched in, he said he forgot. Lou told Bill that was strange inasmuch as John Burnetsky had observed him punch in at 5:57 p.m. Lou also told Bill that he knew what Bill had been doing and what had been going on. To this Bill answered that he was going home sick. Lou informed him that he was going to be put on a notice of discharge for dishonesty. He then started his car and left.

Mr. Pastor submitted the write ups from Lou Pillarella and John Burnetsky and Mr. Mitchell's time card. He continued with his presentation:

At this point, it must be pointed out and already is quite obvious that on seven known occasions, Bill Mitchell left work early and was paid for work he did not perform. He falsified his time cards in order to conceal his activities and to receive unearned pay.

It bears further mentioning that Bill Mitchell's actions were not those of a responsible employee.

At the local hearing held for Bill Mitchell, all of the facts surrounding the incidents were reviewed with him. When asked specific questions as to his activities on the dates in question, Bill commented that none of the facts were true. He further commented that we were out to get him because he was a long seniority employee.

As a result of Bill Mitchell's dishonest acts of stealing time and falsifying his time cards, and because he could not or would not explain his actions, Bill Mitchell was discharged from our employ. (Exhibit I) Exhibit I, a copy of the discharge letter sent to William Mitchell on January 28, 1977, reads as follows:

> "A meeting was held in the Staten Island Center on January 13, 1977. Present were you, Local 177 of-

ficials Joe Purcell and Don Mason, shop steward Harry Stanley, Ray Cooper, Lou Pillarella, Nick Melillo, Brian Flynn and myself.

The purpose of the meeting was quite specific. We reviewed with you the fact that on numerous instances, you were observed leaving the job prior to the completion of your work day. In an effort to conceal this, you falsified your time cards. Your acts were ones of dishonesty and constitute a complete dereliction of your responsibilities as an employee.

When confronted with these facts, you denied them completely and your only explanation was that the charges against you were lies and we were out of get you. You made these comments in spite of the fact that several supervisors observed you on different occasions leaving the job.

We mentioned that we could not tolerate dishonesty from any of our employees.

As a company, we provide you with substantial wage and fringe benefits. For these benefits, we expect that all of our employees be honest with us and provide us with a fair days work.

We made it quite clear to you that you have left us no choice in this matter. Your dishonest acts cannot be tolerated by United Parcel Service. Based on all these facts presented at this meeting, we have no choice but to discharge you from our employ.

/s/ JIM KILKENNY
Division Manager"

As a company we must place our trust in all of our employees.

They are entrusted with large sums of money, and pick up, sort and deliver parcels with high value. Due to the nature of our business, many of our employees spend most of their work day without direct supervision.

When any employee violates this trust by committing dishonest acts, we must deal quickly and severely with that person.

Such was the case with Bill Mitchell.

Bill Mitchell's actions were not those of a responsible employee and constitute a clear dereliction of his duties as an employee.

We must again repeat that not once but on seven known occasions he was observed stealing time. He tried to conceal his acts by keeping two sets of books, so to speak. It is evidence Bill Mitchell found some way to tamper with the time clock in order to falsify his time cards and collect unearned pay.

If we were to condone this type of behavior from Bill Mitchell or any other employee, the fact remains quite clear that our ability to remain in business would be severely challenged. It is further obvious that the jobs of our other employees would be placed in jeopardy.

We had no choice in this matter but to discharge Bill Mitchell.

He has no one to blame but himself in this case.

Based on all of the facts presented, we respectfully submit that the claim of the grievant be denied and that his discharge be upheld.

Mr. Joseph Purcell presented the case for the Union. He presented the following statement of fact to the Committee:

On January 8, 1977, Mr. William Mitchell was put on a notice of discharge for stealing time and falsifying company records. On January 13, 1977, a hearing was held at the Staten Island Center and the company presented their facts about Mr. Mitchell's assumed misconduct. The union's position was that if indeed Mr. Mitchell did what the company said he did, he was only doing what had been past practice and was done with company consent. On Friday nights the company allows our members to go home four hours undertime and pays them for eight hours. They also let Local 177 lock the building because there are no supervisors with them. If the company managers consent to this type of activity, then it must be assumed that they will tolerate other types of misconduct. This local union feels that Mr. Mitchell, if he committed the acts, should have been warned to stop what he was doing. This union also strongly feels that Mr. Mitchell should not have been fired.

We respectfully request that the claim of the union be upheld. Attached is Mr. Mitchell's own statement of facts.

Mr. Purcell presented William Mitchell's statement:

Beginning in 1969 I became the carwasher at the S. I. center at which time the company policy was to turn the building over to me when I arrived for work at 6 p.m.

For the overwhelming majority of time during the 8 years, 1/69 to 1/77, no representative of management was present at this facility during the hours of 6 p.m. to 7 a.m. during the period from 1/69 to 1/77 supervisors have been assigned to the center to observe the operation. These activities included: prolonged T. V. watching, the repair of private autos, trips to various establishments off the company property to secure refreshments, and various

other activities unrelated to the employees' function at UPS. These activities were observed, approved of by and actively joined into by every manager or supervisor that ever stayed at night for a period of at least 8 years. The people who have observed this situation include Louis Pillarella manager, who at one time left his private automobile in the care of one of the carwashers for the purpose of performing repairs on it. This episode was admitted to by Pillarella.

Other witnesses include: N. Mellillo, B. Flynn, B. Main, L. Weeks, J. Sardella, K. Swier, all supervisors.

During the protracted periods of time I was left unsupervised management accepted my performance as being entirely satisfactory. During the tenure of Pillarella as manager pressure has been placed on all inside employees to deliver parcels. The work of these pseudo-deliverymen has then been credited to the regular drivers to achieve an appearance of superior "on road time." I as carwasher however, refused to capitulate to these illegal demands and a policy of harrassment was begun, which failed. These harassments included, but where not limited to, a company effort to have me terminate because the engine in a 17 year old truck failed, obstensibly because of low oil reserves. The remaining fleet was checked for this condition and it was found not to exist. The Union argued successfully in my behalf, however, a 3 day suspension was arbitrarily placed in effect. The company's position at this time was, "to accept the suspension or take it to arbitration," in which case a 3 month de-facto suspension would have resulted. The 3 days were accepted under protest.

All other attempts at coercion failing, and apparently honoring a commitment made to the company, a conspiracy was entered into by management to charge the

carwasher with a sudden case of "leaving the building." The idea to charge "leaving the building" was instigated by events which took place on the night of 7/8/76. After punching out and entering my automobile to go home, I was forcibly restrained on company property by 3 men including the manager, Pillarella, and forced to remain in this confined status for a period of at least 20 minutes. After producing my time card apologies were made and I was allowed to leave. The next day, however, I was informed that I was being dismissed for actions purportedly observed by supervisors on previous occasions.

In the hearing that followed management attempted to prove their position that I had surreptitiously left the building by offering written statements to that effect.

I vigorously denied the charge and challenged the company to produce some proof other than their supervisors' unsubstantiated statements. The company's answer was that their supervisors word was good enough. It seems reasonable to assume that when management is accusing an employee of being a "thief and embezzler," irrevocable evidence should be the order of the day. To allow the company to remove from their employ a man with 13 years seniority just by virtue of their collective statements would be lending credibility to a premise that would effectively destroy our integrity as human beings.

In describing some of the events which have taken place during my 7 years as carwasher on S. I. I am only trying to put the events which led to my dismissal in their proper context. I am guilty, however, of allowing myself to achieve a feeling of false security by permitting management, many times, to work outside the bargaining agreement. For example, loading the missed pieces into a truck at management's suggestion and bringing them to a truck making pickups because of an impending audit.

This example correctly shows management's attitude in regards to rules.

I do offer this statement to be a true and accurate account of the information contained herein.

/s/ WILLIAM MITCHELL"

DECISION:

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

(Material relating to subsequent case deleted.)

Exhibit C.

ATLANTIC AREA PARCEL GRIEVANCE COMMITTEE

Established in accordance with the terms and conditions of the Atlantic Area Parcel Agreement, entered into by and between the several Local Unions and United Parcel Service, Inc.

Docket No. 874

IN THE MATTER OF THE DISPUTE BETWEEN

Teamsters Local #177, Irvington, N. J.
(City and State)

and

UNITED PARCEL SERVICE, INC.

SUBMISSION

We, the undersigned, parties to the Atlantic Area Parcel Agreement, hereby agree to submit the following dispute for a decision under the Rules of Procedure prescribed by the Atlantic Area Parcel Grievance Committee, by virtue of its authority, as set forth in Article 7 of the Atlantic Area Parcel Agreement.

> On behalf of car washer William Mitchell, Union alleges violation of Article 45 (Supplement)—unjust discharge—and requests that grievant be reinstated with full back pay.

The undersigned further agree that a majority decision of the Joint Committee in the above dispute will be final, conclusive and binding with no appeal and, further, that neither party will attempt through any overt acts, to void the decision rendered.

The undersigned also agree that failure to comply with the decision of a majority of the committee within ten (10) days of the date of the decision will result in the loss of all contract rights, privileges and benefits due them under Article 7 of the Atlantic Area Parcel Agreement.

Date: 2-16-77

Employer: United Parcel Service, Inc.
Signed by: William Pastor
Title: District Manager
Local Union: 177
Signed by: Joseph Purcell
Title: Business Agent

DECISION

The panel in executive session, motion made, seconded and carried that the claim of the Union be denied and the discharge be upheld.

Frank Feely
Employer Co-Secretary
2-16-77
Date

Al Barlow
Union Co-Secretary
2-16-77
Date

PLAINTIFF'S 9(g) STATEMENT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED JULY 17, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

PLAINTIFF'S 9(g) STATEMENT

Plaintiff is submitting this statement in response to the 9(g) statement filed by the defendant United Parcel Service, Inc. ("UPS") and claims that there are issues of material facts with respect to the following:

1. There was no *hearing* held on January 13, 1977, but only a meeting at which UPS had already determined to discharge the plaintiff.

2. At the January 13, 1977 meeting, plaintiff was not provided with any specifications or given any documents indicating the charges against him.

3. Plaintiff believed that any grievance hearing would be held in the New York area and was not advised that the grievance hearing would be held in Virginia until February 14, 1977.

4. The Union admitted that there was no established procedure as to where the hearing would be held since this was the first hearing in which Local 177 participated.

5. Plaintiff was advised that the Union would not pay for any witnesses to attend the hearing in Virginia.

6. There was no customary rotation of the Panel since this was the first hearing in which Local 177 was involved and the plaintiff does not know how the site was selected.

7. Plaintiff was unable to be present at the hearing because of the Union's arbitrary conduct. The Union did not represent the plaintiff's position, but presented a position diametrically opposed to that of the plaintiff, admitting that the plaintiff had committed acts he was accused of when the plaintiff had continuously protested his innocence.

8. At the grievance hearing the Panel wanted to know where the plaintiff was.

9. There were no intra-union remedies available to the plaintiff which could afford him relief and if there were, they were not known to the plaintiff.

Dated: New York, New York
July 17, 1979

Ira Leitel and David Jaroslawicz
/s/ By DAVID JAROSLAWICZ
David Jaroslawicz
Attorneys for Plaintiff
Two Lafayette Street
New York, New York 10007
(212) 227-2780

SUPPLEMENTAL AFFIDAVIT OF JAMES KILKENNY SWORN TO AUGUST 30, 1979 IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 Civ. 1547 (CPS)

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

KILKENNY SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES KILKENNY, being duly sworn, deposes and says:

1. I am employed by United Parcel Service, Inc. ("UPS" or the "Company") as Division Manager. I make this supplemental affidavit in further support of defendant

UPS's motion for dismissal of the complaint and/or for summary judgment.

2. Article XIX of the Teamster Constitution (Ex. H to Kilkenny Affidavit) sets forth the intra-union appellate procedures that Mr. Mitchell was required to exhaust prior to commencing this lawsuit. The procedures provide for a grievant, like Mr. Mitchell, to protest the Local Union's handling of his case by filing a complaint with the Local Union Executive Board and, if unsuccessful, by filing an appeal to the Union Joint Council and its Executive Board. Further appeals may be taken to the General Executive Board of the International Union and, ultimately, to the International Convention. Mr. Mitchell made no use of these mandatory intra-union appellate procedures.

3. Had Mr. Mitchell appealed to the higher levels of his union, as Article XIX of the Teamster Constitution requires, it could have led to a rehearing before the Joint Panel. Because there could have been a rehearing if Mr. Mitchell had followed the procedures of his union and the rehearing could have provided Mr. Mitchell with the relief he was seeking, Mr. Mitchell should be barred from maintaining this lawsuit. By ignoring the mandatory intra-union procedures, Mr. Mitchell has needlessly wasted the time and resources of his union, UPS, and this Court.

WHEREFORE, it is respectfully requested that defendant's motion be granted in all respects.

/s/ JAMES KILKENNY
James Kilkenny

Sworn to before me this 30 day of August, 1979.

JOSEPH V. MCWADE
Notary Public
Notary Public of New Jersey
My Commission Expires Sept. 29, 1980

SELECTED PAGES FROM THE DEPOSITION OF JAMES KILKENNY

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[51]

A. No, I know of none.

Q. Did any panel member ask you where Mr. Mitchell was?

A. No, he did not.

Q. Did you hear any panel member ask Mr. Purcell or Mr. Pastor where Mr. Mitchell was?

A. I believe Mr. Purcell was asked whether the grievant was present.

Q. Who asked him that?

A. Which member of the panel I don't know.

Q. But it was one of the panel members?

A. Yes.

Q. What did Mr. Purcell say?

A. I don't remember his exact words but he told them he wasn't there.

Q. Did Mr. Purcell tell the panel why he was not there?

A. I don't recall.

Q. Did the panel ask Mr. Purcell if he had any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

Q. Do you know if Mr. Purcell introduced any witnesses on behalf of Mr. Mitchell?

A. Not that I recall.

SELECTED PAGES FROM THE DEPOSITION OF JOSEPH PURCELL

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[6]

in 1976?

A. Approximately 4,000 people.

Q. What would be the membership, approximately, in 1977 of the Local?

A. About the same.

Q. What are the sources of Local #177's income?

A. What do you mean by that?

Q. What do they derive from, what sources?

A. You mean the union dues, that's all.

Q. Only union dues?

A. Yes.

Q. Do they receive union dues directly from the members, or do they receive it as a checkoff system from the employer?

A. Checkoff.

Q. What is checked off for members of the union, what amounts?

A. In 1976, I believe it was $12.

Q. Twelve dollars?

A. Per month.

Q. Per employee?

A. Yes.

Q. Regardless of the position of the employee?

A. Yes.

[8]

of the Local?

A. Yes.

Q. Who is the present secretary of the union?

A. Perruci, P-e-r-r-u-c-i.

Q. Would Mr. Perruci have copies of the records of the Local of '76 and '77?

A. Yes, he would.

Q. Would you be able to refer to Mr. Perruci now in obtaining that information for us?

A. I will meet with him this afternoon.

Q. Thank you very much.

The $12 per month that you noted was remitted per member to the Local, was that all subtracted from the employee's salary, or was any portion of it paid by the employer?

A. Deducted from his salary.

Q. So that the entire $12, in effect, was paid by the employee?

A. Right.

Q. Do you know who the plaintiff is, Mr. Purcell?

A. William Mitchell.

Q. Yes.

A. Yes.

Q. Do you know whether Mr. Mitchell became a

[13]

(A one-minute break was taken.)

Q. In 1977, in February, you attended a meeting of the Atlantic Area Grievance Committee held in Virginia Beach, Virginia.

A. Right.

Q. Isn't that true?

A. Yes, sir.

Q. How did you go to Virginia, how did you travel?

A. Flew by plane.

Q. By plane?

A. Yes, sir.

Q. Did you go alone to that meeting, or did you travel in the company of anybody else?

A. I went alone.

Q. Who paid for the airplane tickets?

A. 177.

Q. So that was something that the Local had paid over and above your salary and your $50 a week expense account; isn't that true?

A. Local #177 pays all travel and all my room expenses.

Q. So that while you were in Virginia Beach, did you stay in a hotel?

A. Yes.

Q. This is referring again to February 15th and

[14]

16th of '77.

What hotel did you stay in in Virginia Beach?

A. I don't really know.

Q. Did the union, in any event, pay for that hotel room?

A. Local #177 paid for that room.

Q. How did you pay for that, sir?

Did you pay that by giving cash and asking for reimbursement?

A. No.

Q. How did you effect payment?

A. Direct bill back to the Local.

Q. Back to the Local?

A. Right

Q. There was no charge cards used?

A. We didn't have charge cards at that time.

Q. When did you first get charge cards?

A. I got my charge card about six weeks ago.

Q. How about the airline flight, how was payment effected for that?

A. By check.

Q. The Local paid directly?

A. To the airlines.

Q. What about your food while you were there, you

[15]

were required to eat out, obviously?

A. Yes.

Q. Who paid for that?

A. I received a $50-a-day expense for food and taxi fare and what other expenses I needed.

Q. While you were traveling?

A. Yes.

Q. So in addition to the $50-a-week figure in your salary and the union would pay for your airplane transportation?

A. Yes.

Q. And your hotel room?

A. Yes.

Q. And in addition, the union would give you a $50-a-day figure to cover food and taxis?

A. Yes.

Mr. Parsonnet: I'm going to interpose and object at this point.

I have been listening to the questions and I don't understand the relevance to the claims in the Mitchell complaint.

So I am objecting to the question about expenses and payment, therefore, as not being relevant to anything in the complaint.

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Q. The $50 figure that you indicated you received per day, was that similar to the other $50 per week figure, that is, that you received, that regardless of the actual expenses incurred?

A. Yes.

Q. So that if you actually spent less on food and taxis, you kept the difference, and similarly, if you paid more it came out of your pocket?

A. That's right.

Q. While you were in Virginia Beach, Virginia in February of '77, how many nights did you spend there?

A. I think I spent two nights there.

Q. Could you give us the—

A. I think I flew in on a Monday.

Q. What was the date of that?

A. Might have been the 14th.

Mr. Leitel: Let me get a calendar for you.

Q. This column on the calendar would be '77.

A. I think I flew in on the 14th, which is a Monday, and I flew back on the 16th.

So I spent Monday and Tuesday night there.

Q. Monday, the night of the 14th?

A. Right, and Tuesday night, the night of the 15th.

Q. Now, you flew in on Monday the 14th.

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you will respond in general.

The Witness: Fine.

Q. You testified that on the July 12th date of this hearing for one reason or another, your request or the company's request, it was adjourned.

A. Somebody couldn't make it, right.

Q. And you don't recall the reason why it was adjourned?

A. No, I don't.

Q. Did you speak to Mr. Mitchell, if you recall, and tell him that there was an adjournment?

A. No, I didn't. I told the shop steward, Harry Daniel.

Q. Did you tell him to inform Mr. Mitchell that there was an adjournment?

A. Yes.

Q. Was it adjourned to a specific date?

A. I believe it was adjourned to that Thursday or Friday, one of those two days.

Q. Of that—

A. Of that same week.

Q. The Thursday or Friday of that week would be July 15th or July 16th?

A. Right.

Q. Was it held on that date?

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A. No, it wasn't.

Q. Did you take any steps between July 12th and the next scheduled date, the 15th or 16th, to investigate the allegations against Mr. Mitchell?

A. No, Mr. Mitchell went out on compensation on the 13th or 14th, I believe.

Q. During the period of time that Mr. Mitchell was out on compensation—

A. Yes.

Q. — did you, yourself, take any steps to investigate the allegations made against Mr. Mitchell?

A. No, I didn't. Because at that time I was involved in contract negotiations in Washington, D.C.

Q. Did you assign or delegate the task of investigating the allegations against Mr. Mitchell to anyone else in your local?

A. No.

Q. When did you next hear about the Notice of Hearing against Mr. Mitchell?

A. It was in January 9, '77. We had heard nothing from Mitchell for the entire time that he was out on compensation.

Q. Do you know that Mr. Mitchell returned from compensation to work at one time; isn't that true?

[30]

A. In January.

Q. January of '77, you believe?

A. That's what I heard, when he came back to work that is when the company called him.

Q. Who called you from the company?

A. I believe it was either Jim Kilkenny or Elmer Kenworth, they were both division managers.

Q. When did they call you, sir?

A. In January.

Q. Could you be more specific to a date?

A. I guess the week that he came back to work.

Q. That was January of '77?

A. Right.

Q. What did they tell you?

A. They said Mitchell was back to work and they would like to set up a date of the hearing of the charges that they had against him, pending from July, '76.

Q. What was your response?

A. I said, yes.

Q. Was a date set at that time?

A. Yes.

Q. Was that the date, at that time, set for January 13th?

A. Yes.

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A. No. If I can explain.

United Parcel puts a man on Notice. They just give you a generality, stealing time.

They do not tell you specifics until you get into the hearing.

Q. Did you make any attempts before the January 13th of '77 hearing to determine the specifics of the charges?

A. I asked United Parcel Service, and they told me that at the hearing I would hear all the specifics.

Q. Who did you ask for the specifics, and when?

A. Jim Kilkenny, and I asked him right after I got the phone call that they wanted to send to me that Mitchell was back to work.

Q. After the January, '77 phone call?

A. Right.

Q. And you asked this ordinarily of Mr. Kilkenny?

A. On the phone.

Q. What was Mr. Kilkenny's response?

A. I believe his response was that when I got to the hearing I would find out all pertinent facts.

Q. So, did you make any written demands on Mr. Kilkenny for the specifications of the charges?

A. No, I didn't. I never do.

[35]

A. No.

Q. —regarding that matter?

A. No.

Q. Did you receive any calls from Mr. Stanley before the actual hearing informing you of the results, if any, of his investigation?

A. No, I didn't.

Q. You came to the premises of the Staten Island facility—

A. Yes.

Q. —on January 16th?

A. 13th.

Q. Excuse me, January 13th, '77.

A. Right.

Q. Did you come alone?

A. No.

Q. Who did you come with?

A. Don Mason, another business agent.

Q. Did you have any discussions with Mr. Mitchell and Mr. Stanley?

A. Yes, I did.

Q. Before going into the hearing?

A. Yes, I did.

Q. Who was present at those discussions?

[36]

A. Don Mason, myself, Harry Stanley, and William Mitchell.

Q. Where did they take place?

A. Downstairs in the UPS building.

Q. To the best of your recollection, what was said and by whom?

A. To the best of my recollection, I told Bill that they claim that you went home, that you falsified your timecards, and that you were stealing time.

Bill told me that he did none of that. He was on the property at all times, and his timecards were proof.

And I said, "Okay, Bill. Let's go upstairs and find out what they got."

Q. When did you learn for the first time that there was an allegation of falsification of the timecards?

A. When they put them on the Notice.

Q. So, you knew that as early as July of '76?

A. Yes.

Q. Did you ever engage anyone, or requested anyone to check the punching clock at the Staten Island facility?

MR. PARSONNET: What do you mean "check"?

MR. LEITEL: Examine.

[38]

those cards from the company?

A. No. It's not standard procedure.

MR. PARSONNET: You mean before the meeting?

MR. LEITEL: Right.

Q. Your answer was no, you did not request them?
A. Right.
Q. You went upstairs, the four of you?
A. Right.
Q. Who was present at the meeting upstairs?
A. For the company?
Q. Yes.
A. It was Lou Parriello, Jim Kilkenny. And I believe there was two supervisors in the room at the same time. There was four of them, I believe.
Q. What, if anything, was said at that meeting, and by whom?
A. Mr. Kilkenny ran the meeting, he was acting in Elmer Kenworth's place. For some reason Mr. Kenworth was sick.
Q. Who is Mr. Kenworth?
A. Kenworth is division manager for the Staten Island building.
Mr. Kilkenny produced the timecards of all the days that they alleged that Mitchell had left the

[62]

Q. Within 30 days of January 13th?
A. Whatever the date was of the discharge.
Q. You stated before that you informed Mr. Mitchell at that time that he would have to pay his own expenses.

A. That's right.

Q. Did he voice any surprise as to that?

A. Said he didn't have the money to go anyway.

Q. Did you tell him that he would have to pay the expenses, at that time, of any of his witnesses?

A. Never came up about his witnesses, because he knew that Anderson and Murray won't come upstairs and testify for him then.

And he was sitting in at Staten Island, so I didn't know where he was going to come up with any witnesses.

Q. Didn't you say a moment ago that he might have other witnesses?

A. Yes, I told him.

Q. In addition to Anderson and Murray?

A. Right.

Q. Any discussions or if he could come up with other witnesses who would pay their expenses?

A. He never asked.

Q. Did you tell him?

A. No.

[66]

Q. Did you ever have any further discussions with Mr. Mason regarding whether or not he checked out with these other people?

A. Yes, I did.

Q. When was that discussion held?

A. I guess a couple of weeks later, a week later when we were in the office.

Q. What did Mr. Mason inform you, if anything, with that?

A. I believe he said he called up Staten Island and none of them would come forward and testify or give written statements, substantiating Mr. Mitchell.

Q. Did they say that they were against Mr. Mitchell.

A. No, they didn't. They just stated that they wouldn't get involved and didn't want to testify, wouldn't give us written statements.

Q. Did he indicate that he had spoken to all of these people?

A. No, he didn't.

Q. Did he indicate which of any of these people he had, in fact, spoken to?

A. He told me he had talked to some of the guys on pre-load, and none of them wanted to testify for Mitchell.

Q. Mitchell, did you ask him if he had spoken to

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calling me or I was calling him.

Q. During any of these conversations, did you tell Mr. Mitchell that Mr. Mason had contacted all of these other people, or you thought that he had contacted all of these other people, and that they had declined to give statements?

A. I told Mr. Mitchell that I couldn't get anybody to come forward and testify for him. I didn't say all or some, that's what I told him.

Q. Do you remember when you told him this?

A. One of the phone conversations we had.

Q. What was Mr. Mitchell's reaction, if any, to that?

A. Nothing; so be it, that was it.

Q. Did Mr. Mitchell during any of these conversations, again indicate his desire to go to the grievance hearing?

A. No, he didn't.

Q. Did he at any time, during any of these telephone conversations, again ask about funds for getting to these grievance hearings?

A. No, he didn't.

Q. You had asked Mr. Mitchell for a notarized statement?

[69]

A. Yes, I did.

Q. And you received that notarized statement at some time?

A. Some time, I just don't remember what date I received it.

Q. When were you notified for the first time of the date for the grievance hearing regarding Mr. Mitchell and the place of such a hearing?

A. I believe it was either the Thursday or Friday before the week, before the Panel was held.

Q. Could you look at the calendar, Mr. Purcell, and see if you can give me the day?

A. The Panel is always held on Tuesdays and Wednesdays. Okay, so if I got the call the 14th was on a Monday, I had to get it Thursday or Friday.

Q. This was——

A. The 14th was a Monday is correct.

So, I got the call either Thursday or Friday.

Q. And the Thursday or Friday would have been the —Thursday, the 10th of February, and Friday would have been the 11th of February?

A. I got a call from the conference to my office telling me—I don't know whether I got the one or Mason got the call—but one of us got the call that the

[83]

A. No, they never let us do that. Only at the hearing. In other words, what I'm telling you, physically I go to the hearing, and after that hearing I call out to the processor and I want to interview Brian Film, they wouldn't let me.

Q. This is an UPS policy?

A. It is a UPS policy as long as I have been in the Local.

Q. Not to let the Local interview any members of employees of UPS that might be witnesses?

A. Management employees.

Q. That might be witnesses against a member of your union, management?

A. Yes.

Q. So in addition to not providing prior to the hearing, not providing you with——

A. Which union are you talking about now?

Q. Let's talk about the hearing that was held on January 13th.

A. Yes.

Q. —in addition to not being provided with any particulars of the charges, specifications of the charges, it is an UPS policy not to allow you to interview any of their witnesses, management witnesses?

[84]

A. Until the hearing.

Q. Until the moment of the hearing?

A. That's right.

Q. After the January 13th hearing and before the grievance meeting on the 16th of March——

A. Right.

Q. —did you attempt to interview any of the management witnesses?

A. They will not let you.

Q. Is that, too, an UPS policy?

A. Yes, it was.

Q. Even after a discharge and before a grievance hearing——

A. Yes, it is.

Q. —not to permit you to interview any of their witnesses?

A. Yes, it is.

Q. Did you following the January 13th meeting or hearing and up to the February 16th meeting, did you obtain any copies of any of the statements of UPS' managers?

A. They will not give them to you.

Q. Is that, too, a policy of UPS to deny you copies of the statements of their management personnel, who

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A. Yes.

Q. Were you familiar with the procedures, or are there procedures for obtaining an adjournment of a hearing?

A. No.

Q. There are no procedures for obtaining one, or you are not familiar with it?

A. No, at that time I was not familiar with it. I had no reason to be, because Mitchell didn't ask me to adjourn it.

Q. Did you know that the next Atlantic Area grievance meeting was to be held in March of '77?

A. Yes, I did.

Q. Did you know before the February 16th meeting?

A. Yes, I did.

Q. Did you know that that was going to be held in Philadelphia?

A. Yes, I did.

Q. Did you know that there was one coming up in May?

A. Every other month.

Q. '77, and did you know that that one was going to be held in Atlantic City, New Jersey?

A. Yes, I did.

[115]

Mr. Parsonnet: You mean the timecards?

A. Timecards you are talking about?

Q. Timecards, yes.

A. Excuse me.

Yes, they were.

Q. They were presented?

A. Yes.

Q. Who were they presented by?

A. Jim Kilkenny.

Q. What, to your recollection, did Mr. Kilkenny say about those cards?

A. He put those cards into evidence to see that there was a punch-in time and such and such time and punch-out time on the dates that they allege Mr. Mitchell was home.

Q. Prior to that meeting, did you ever request from UPS, in the management, the opportunity to again inspect these cards?

A. I saw them at the hearing.

Q. Yes, I'm talking about following the January 13th hearing.

A. When I asked Mr. Kilkenny if I could look at the statement, and everything, I assumed that they would be in there, and he said no.

Q. In other words, you assumed that your request

ANSWERS TO INTERROGATORIES ON BEHALF OF LOCAL UNION NO. 177

8. All who had cases presented to the AAPGC were advised that they had to pay their own way. All who attended paid their own expenses. No grievant had his or her expenses paid by the Local Union.

9. Article 42 of the U. P. S.-N. J. Area Supplement which provide *inter alia,* that grievances are heard by the next AAPGC meeting, at least seven days after submission and preference is given to discharge case.

   An agenda of meetings is set up at the beginning of each year for the year setting dates and places for each meeting. Discharge cases are given preference to be heard first at each such meeting; and must be submitted at least seven days prior to the meeting which was done in Plaintiff's case.

10. There was no transcript taken. The names and addresses of the committee members were:

    David Murray
    20 Hook Mountain Road
    Pinebrook, New Jersey

    John Foley
    c/o U. P. S.
    8325 Ardwich Ardmore Road
    Landover, Maryland

    Frank Feely
    51 Weaver Street
    Greenwich, Connecticut 06830

    Alfred Barlow
    c/o Eastern Conference of Teamsters
    4641 Montgomery Avenue
    Bethesday, Maryland 20014

Russell Hogan
P. O. Box 11298
Greensboro, North Carolina 27409

John Sullivan
1030 South Dupont Street
Baltimore, Maryland 21223

DECISION OF THE COURT DATED OCTOBER 23, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 C 1547

WILLIAM MITCHELL,

Plaintiff,

—against—

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

SIFTON, *District Judge.*

Pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U. S. C. § 185, plaintiff, William Mitchell, instituted this action against his former employer and his union alleging wrongful discharge and inadequate representation. The suit was commenced over a year after a joint arbitation panel, convened in accordance with the collective bargaining agreement between defendants, issued an award sustaining Mitchell's discharge for allegedly falsifying his time cards. Mitchell seeks reinstatement and damages primarily on the ground that he was inadequately represented by his union before the joint grievance committee.

This case bears great resemblance to *Wallace v. AT&T*, 460 F. Supp. 755 (E. D. N. Y. 1978), in which this Court dismissed a similar complaint as time barred

under CPLR 7511(a). In *Wallace*, this Court determined that a suit seeking reinstatement and damages for allegedly wrongful discharge pursuant to an arbitration award is appropriately characterized as a suit to vacate the award and is, therefore subject to the 90-day limitation period provided in the State's statute. Further, this Court held that in view of the inter-relationship between a Section 301 claim against an employer and an unfair representation claim against a union—both stemming from the allegedly wrongful discharge of an employee contrary to the terms of the collective bargaining agreement—both the unfair representation claim against the union and the improper discharge claim against the employer are properly governed by the same statute. A reexamination of *Wallace* suggests that these principles are equally applicable to the present case and that a similar result should obtain here.

This Court reaches the conclusion that summary judgment is appropriate despite the arguments set forth in plaintiff's brief which seek to have the Court distinguish or reconsider *Wallace*. First, Mitchell suggests that he is not seeking to vacate an arbitration award since a meaningful arbitration of his grievance never occurred. However, the failure to seek to vacate the award *in haec verba* cannot be determinative. The relief sought was expressly denied in an arbitation award issued as a result of a full-scale, arbitration proceeding. The effect of any grant of the relief sought by this Court would be to vacate the determination of the arbitrators.

Plaintiff additionally calls attention to a footnote in the Supreme Court decision of *UAW v. Hoosier Cardinal Corp.*, 383 U. S. 696, 707 n. 9 (1965), which states that "other questions would be raised if this case presented a state law characterization of a 301 suit that reasonably described the nature of the cause of action, but required application of an unusually short or long limitation period." *Id.* note 9,

at 707. In view of the three-month statute of limitations contained in the Federal Arbitration Statute, 9 U. S. C. § 12, it is at least questionable whether the Supreme Court would regard the New York limitation as "too short." Nor is it apparent what "other questions" would be raised by plaintiff in this case as a result of the application of the 90-day period, or why such questions should be resolved in plaintiff's favor. The policy favoring "relatively rapid disposition of labor disputes" recognized in *Hoosier Cardinal* combines in this case with the policy favoring arbitration as a means of securing a quick and final resolution of disputes in general. Accordingly, for the reasons set forth herein and in this Court's earlier opinion in *Wallace v. AT&T, supra,* defendants' motion for summary judgment is granted and the Clerk is directed to enter judgment dismissing plaintiff's complaint and to mail a copy of this opinion to counsel for all parties.

So Ordered.

Dated: Brooklyn, New York
October 23, 1979.

/s/ Charles P. Sifton
United State District Judge

JUDGMENT FILED OCTOBER 26, 1979 DISMISSING THE PLAINTIFF'S COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 C 1547

WILLIAM MITCHELL,

Plaintiff,

– against –

UNITED PARCEL SERVICE, INC., et al.,

Defendants.

JUDGMENT

A Memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on October 25, 1979, granting defendants' motion for summary judgment, and directing the Clerk of Court to enter judgment dismissing plaintiff's complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; that defendants' motion for summary judgment is granted; and that judgment is hereby entered dismissing the complaint.

Dated: Brooklyn, New York
October 25, 1979

H. WEARE
Clerk of Court

DECISION OF THE COURT OF APPEALS DATED MARCH 3, 1980

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 748—September Term, 1979
(Argued February 29, 1980 Decided March 3, 1980)
Docket No. 79-7803

WILLIAM MITCHELL,
Plaintiff-Appellant,

—v.—

UNITED PARCEL SERVICE, INC., and DEPARTMENT STORE AND WHOLESALE DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #177,
Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
TIMBERS, *Circuit Judge,*
and WERKER, *District Judge.**

Appeal from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act as barred by the applicable New York statute of limitations.

Reversed and remanded.

* Hon. Henry F. Werker, United States District Judge for the Southern District of New York, sitting by designation.

DAVID JAROSLAWICZ, New York, N. Y. (Ira Leitel, Carol Mellor, and Leitel and Jaroslawicz, New York, N. Y., on the brief), *for appellant Mitchell.*

M. DAVID ZURNDORFER, New York, N. Y. (Edward Silver, Mark L. Goldstein and Proskauer Rose Goetz & Mendelsohn, New York, N. Y., on the brief), *for appellee United Parcel Service, Inc.*

ALBERT S. PARSONNET, Newark, N. J. (Parsonnet, Duggan & Pykon, Newark, N. J., on the brief), *for appellee Department Store And Wholesale Drivers, Warehousemen And Helpers Local Union #177.*

OPINION

TIMBERS, *Circuit Judge:*

Appellant William Mitchell appeals from a judgment entered in the Eastern District of New York, Charles P. Sifton, *District Judge,* dismissing appellant's wrongful discharge complaint under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), as barred by the 90 day limitation period of § 7511 of the New York Civil Practice Law and Rules. The sole issue on appeal [1] is whether the district court erred in applying § 7511 to the instant action. We hold that it did.

1. On appeal, appellees argue that the complaint was properly dismissed not only because it was time-barred, but also because appellant failed to exhaust his intra-union remedies and failed to raise a triable issue concerning appellee union's alleged breach of its duty of fair representation. The district court, however, did not address these issues. We therefore shall not address them for the first time here. Appellees are free to raise these issues in the district court on remand.

I.

Appellant, a member of Local Union #177 of the Department Store and Wholesale Drivers, Warehousemen and Helpers, was employed as a car washer by United Parcel Service, Inc. (UPS). In January 1977 appellant was discharged by UPS for dishonest acts, including "stealing time" and falsifying time cards. Appellant, who denied the charges against him, requested that his union file a grievance on his behalf contesting the discharge. As a member of Local Union #177, the terms of appellant's employment, including grounds for discharge and grievance procedures, were governed by the collective bargaining agreement between UPS and Local Union #177. Pursuant to this agreement appellant's grievance was submitted to an arbitration panel—the Joint Atlantic Area Parcel Grievance Committee—for final resolution. Appellant was represented by his union at the hearing before this panel. On February 16, 1977 the arbitration panel denied appellant's grievance and upheld his discharge. According to the collective bargaining agreement, this decision was final and binding.

Seventeen months after the arbitral decision was rendered, appellant filed an action under LMRA § 301 [2] against his union and employer, alleging that UPS had breached the collective bargaining agreement by wrongfully discharging him and that Local Union #177 had breached its statutory duty of fair representation by the

2. Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976), provides in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

manner in which it handled appellant's grievance. The district court granted appellees' motions for summary judgment, dismissing the complaint on the ground that the action was barred by the 90 day limitation period set forth in § 7511.[3]

II.

There is no federal statute of limitations applicable to § 301 actions. As a result, the Supreme Court has held that "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U. S. 696, 704-05 (1966).

The district court, reasoning the "[t]he effect of any grant of relief . . . would be to vacate the determination of the arbitrators," held that the appropriate state statute of limitations was the 90 day period for "application[s] to vacate or modify an [arbitration] award". N. Y. Civ. Prac. Law § 7511 (McKinney 1963). We disagree. We hold that the limitation period which should have been applied is New York's six year period for actions alleging breach of contract. N .Y. Civ. Prac. Law § 213(2) (McKinney 1972).

In addressing the question of which New York statute of limitations should be applied in this case, we turn first to our decision in *Abrams v. Carrier Corp.*, 434 F. 2d 1234 (2 Cir. 1970), *cert. denied*, 401 U. S. 1009 (1971), where we held that:

---

3. N. Y. Civ. Prac. Law § 7511 (McKinney 1963) provides that:

> "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him."

> "when a § 301 suit is brought against an employer alleging breach of the collective bargaining agreement in conjunction with a claim that the union breached its fair representation duty to pursue the employee's grievance, the same period of limitations should be applied to both claims. In the present case, the proper limitation period . . . is the six-year limitation set out in N. Y. CPLR § 213(2) for 'an action upon a contractual obligation or liability express or implied.'" *Id.* at 1252-53 (footnote omitted).

The factual claims underlying the § 301 action in *Abrams* were the same as those in the instant case, namely, a wrongful discharge by the employer coupled with a bad faith failure by the union to represent the employee adequately in discharge proceedings. The only difference between *Abrams* and the instant case is that here the employee was terminated after his grievance was rejected at arbitration, whereas in *Abrams* the grievance was not taken to arbitration. Citing this difference, appellees urge that we apply a different statute of limitations to the § 301 action in this case than the six year statute of limitations which we applied to the § 301 action in *Abrams*. We do not believe that such a fractionalized approach to § 301 wrongful discharge actions is warranted.

In determining which state statute of limitations to apply to a federal cause of action, courts must characterize the action in the manner that "best effectuates the federal policy at issue." *Butler v. Local Union 823, Int'l Brotherhood of Teamsters, etc.*, 514 F. 2d 442, 446 (8 Cir. 1975); *Charney v. Thomas*, 372 F. 2d 97, 100 (6 Cir. 1967). Appellees, pointing chiefly to the federal policy of according finality to arbitration awards and the federal goal of "relatively rapid disposition of labor disputes," *Int'l Union, etc. v. Hoosier Cardinal Corp.*,

supra, 383 U. S. at 707, argue that § 301 wrongful discharge actions commenced *after* arbitral decisions should be governed by the 90 day limitation period even if other § 301 wrongful discharge actions are governed by another statute.

We do not agree. The Supreme Court has made it clear that the federal policy of according finality to arbitration awards must yield to the conflicting federal policy of providing employees with the opportunity "to secure individual redress for damaging failure of the employer to abide by the [collective bargaining] contract." *Hines v. Anchor Motor Freight, Inc.,* 424 U. S. 554, 571 (1976). In *Hines,* the Court granted discharged employees the right to sue employers and unions under § 301 despite the fact that the discharges had been upheld in "final" arbitration. In so doing, the Court rejected the argument that the federal policy of according finality to arbitration awards prevented employees from contesting arbitral decisions in § 301 actions. If we were to limit employee § 301 actions to a 90 day period following the adverse arbitral decision, we would severely restrict the Supreme Court's decision to allow employees to challenge arbitral decisions in conjunction with charges of bad faith representation by their union.

Furthermore, § 301 actions do not require the short limitation periods which are generally applied to assaults on arbitration awards. Contrary to the district court's characterization, § 301 actions cannot be equated to direct attacks on arbitration awards, nor can they be viewed as the same threat to the finality of arbitration awards. Arbitration awards cannot be vacated pursuant to § 301 on the ground that the arbitrators erred in their factual findings, or that the arbitrators reached faulty legal conclusions, or that the proceedings were flawed. *Hines v. Anchor Motor Freight, Inc., supra,* 424 U. S. at 571;

Barbarino v. Anchor Motor Freight, Inc., 421 F. Supp. 1003, 1005 (W. D. N. Y. 1976). Rather, actions under § 301 are limited to those rare cases where the discharged employee can demonstrate *both* that the employer violated the collective bargaining agreement by discharging him *and* that the union violated its statutory duty by failing to represent him in good faith.

This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge. There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge. To require an employee—who is suddenly out of work—to obtain new counsel and file an action against his union and employer all within 90 days of his discharge strikes us as unwarranted.

Neither do we accept the argument that the 90 day limitation period is necessary to further the federal goal of relatively rapid disposition of labor disputes. The Court in *Hoosier, supra,* 383 U. S. at 707, indicated that a six year statute of limitations adequately furthered this federal labor policy. Far from suggesting that a 90 day period was needed to reach the goal of "relatively rapid" resolution of disputes, the *Hoosier* Court indicated that "unusually short" limitation periods—such as a 60 day New Mexico statute—should not be applied to § 301 actions. 383 U. S. at 707 n. 9.

Finally, we note that the characterization of § 301 actions such as the instant one as actions "to vacate arbitration awards" is not even conceptually sound. First, an action to vacate an arbitration award under New York law may not be instituted by discharged employees like appellant. *In re Soto,* 7 N. Y. 2d 397, 165 N. E. 2d 855, 198 N. Y. S. 2d 282 (1960). This difference is not an insubstantial one. While it may be reasonable

to require the parties to a bargaining agreement (*i.e.*, the union and the employer) to contest an arbitral decision within 90 days, individual employees may well lack the resources to act as quickly. Second, a § 301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. "Although the effect of a judgment for [the discharged employee] would be to nullify the arbitral decision, the § 301 action is 'independent' of the grievance process . . . . Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance." *Smart v. Ellis Trucking Co.*, 580 F. 2d 215, 219 (6 Cir. 1978), *cert. denied*, 440 U. S. 958 (1979); *see Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 567-68; *Vaca v. Sipes*, 386 U. S. 171 (1967).

Regardless of whether an arbitration decision has been entered, the issue in a § 301 wrongful discharge action remains whether the employer has breached the collective bargaining contract and whether a union breach of duty contributed to the contractual breach. *Hines v. Anchor Motor Freight, Inc., supra*, 424 U. S. at 568. The mere fact that an arbitral decision has been rendered during the course of the employee termination process does not convert the character of a § 301 action from an action for breach of contract to an action for vacating an arbitration award.

III.

In summary, we reject the district court's characterization of the instant § 301 action as an action to vacate an arbitration award, and accordingly reverse the district court's dismissal of appellant's complaint as barred by § 7511. We hold that New York's six year limitation period for contractual breaches, § 213(2), is applicable to

LMRA § 301 actions by employees alleging wrongful discharge by the employer and breach of the fair representation duty by the union—regardless of whether the discharge was upheld by an arbitral panel or became final short of arbitration. Applying the six year limitation period of § 213(2) provides for relatively rapid disposition of labor disputes without undermining an employee's ability to vindicate his rights through § 301 actions. Thus, application of § 213(2) rather than § 7511 allows us to "best effectuate" the several federal policies implicated by actions under § 301.

Reversed and remanded.

80-169

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

UNITED PARCEL SERVICE, INC.,

Petitioner,

- against -

WILLIAM MITCHELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Gray v. International Assoc. of Heat and Frost Insulators and Asbestos Workers, Local No. 51, 416 F.2d 313 (6th Cir. 1969) 15

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Hines v. Anchor Motor Freight, Inc., 424 U.S. 544 (1976) 16-17

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Statutes Cited:

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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED PARCEL SERVICE, INC.,

Petitioner,

- against -

WILLIAM MITCHELL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTORY STATEMENT

The respondent is submitting this brief in opposition to the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the grounds that there are no issues requiring determination by this Court and the petitioner's statement of the alleged issues to this Court is misleading.

OPINIONS BELOW

Neither the opinion of the United States District Court for the Eastern District of New York nor the opinion of the United States Court of Appeals for the Second Circuit, reversing the opinion of the district court, has been officially reported.

QUESTION PRESENTED

1. When an employee who is employed in the State of New York is discharged be-

cause an alleged arbitration has been held in Virginia regarding his discharge, at which he was not present and was unable to participate because of the Union's failure to adequately and fairly represent him, can the employee's claim against the Union under Section 301 of the Labor Management Relations Act of 1947 for a breach of its duty of fair representation be construed as a proceeding to vacate an arbitration award rather than an action against the Union for the breach of its duty of fair representation and an action against the employer for breach of contract?

STATUTES AND RULES INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185 (a), provides in pertinent part as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce... may be brought in any district court

of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 7511(a) of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. Law §7511(a) (McKinney), provides as follows:

"When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him."

Section 213 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. Law §213 (McKinney) provides in pertinent part as follows:

"The following actions must be commenced within six years: . . .

(2) An action upon a contractual obligation of liability express or implied, except as provided in Article 2 of the Uniform Commercial Code . . ."

Section 214 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. Law §214 (McKinney) provides in pertinent part as follows:

"The following actions must be commenced within three years: . . .

(2) an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215 . . ."

STATEMENT OF THE CASE

The plaintiff was employed by the defendant United Parcel Service, Inc. at a Staten Island, New York facility, since 1964. He was a member of the defendant Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 ("Local 177"). Local 177 was a member union of the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International").

On January 13, 1977, plaintiff was advised by a UPS Division Manager that he was being discharged for dishonesty, allegedly stealing time by leaving the job early.

Plaintiff requested the Union to file a grievance on his behalf and was advised that a grievance would be filed and the Union would inform him when the hearing

was to take place. Plaintiff advised the Union that two employees were witnesses to what had occurred and would testify on his behalf.

Thereafter, plaintiff heard nothing from the Union when suddenly, on the afternoon of February 14, 1977, plaintiff was sent a telegram reading as follows:

> "Please be advised that your grievance against United Parcel Service concerning your discharge will be heard by the panel on Wednesday February 16 1977 in Virginia Beach Virginia if you wish to attend you must assume all your expenses please advise"

The plaintiff by this time had been out of work, had no funds to get to Virginia Beach, Virginia, could not possibly obtain witnesses on such short notice, could not obtain counsel, and was due at the Welfare Department on that day to obtain eating money for his family.

Up to the time that the plaintiff received the telegram advising him that the

grievance hearing would be held in Virginia Beach, Virginia, he had never expected or anticipated that the grievance hearing would be held anywhere other than the New York metropolitan area where such hearings had always been held in the past.

Thus, immediately upon receiving the telegram, the plaintiff contacted Local 177 and requested that the February 16, 1977 hearing date be adjourned or if it could not be adjourned, that the Local at the very least supply the plaintiff with funds so that he could attend the hearing in Virginia. Local 177 advised the plaintiff that there was nothing they could do for him and the plaintiff was unable to attend the hearing.

Thereafter, the plaintiff was advised by Local 177 that his discharge had been upheld by the grievance panel in Virginia and stated "that's the way it goes."

When the plaintiff reviewed the minutes of what had transpired in Virginia, it became clear to him that his interests had in fact not been represented by the Union at the grievance hearing. From the first time that the plaintiff was advised that charges were being brought against him for stealing time, he had denied those charges and said that they were false. He had consistently advised the Local of witnesses who could support the plaintiff's position.

At the hearing, the Union made a mockery of the plaintiff's position. The Union first presented to the Panel its position that Mr. Mitchell was in fact guilty, but was only doing what past practice had made seem permissible and that the plaintiff should have been warned to cease what he was doing and not been discharged. In any event, the Union went on to claim, the plaintiff should not have been fired. The Union then, in complete contradiction to the position it had just

presented, presented the plaintiff's own statement to the Committee which professed the plaintiff's innocence.

Most significant is the Union's failure to provide the plaintiff with adequate notice so that he could attend a hearing in Virginia and have his witnesses present. The extreme importance of this is that during the hearing, the panel members inquired of the Union Representative Purcell where the plaintiff was, and that Mr. Purcell responded that the plaintiff was not there. Obviously, if the plaintiff was not interested in appearing at the hearing, the panel could not help but feel that he was in fact guilty.

Based upon the foregoing facts and the Union's complete failure to fairly represent the plaintiff, the plaintiff commenced this action against Local 177 and the International based upon Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, and a concurrent breach of contract claim

against UPS for their discharge of the plaintiff in violation of the collective bargaining agreement.

The plaintiff's action was commenced on July 20, 1978, approximately 17 months after his discharge was upheld by the grievance panel in Virginia Beach, in the United States District Court for the Eastern District of New York and was assigned to Judge Sifton. After some discovery was had, all of the defendants moved for summary judgment on the grounds that:

1. The action was allegedly barred by the applicable statute of limitations which the defendants claim was ninety days pursuant to CPLR 7511(a), the statute applicable to vacate an arbitration award;
2. The plaintiff allegedly had not set forth a proper claim for unfair representation in his complaint and thus his complaint against Local 177 and UPS must fall; and

3. The plaintiff had allegedly failed to exhaust his intra-union remedies.

Judge Sifton dismissed the plaintiff's complaint on the grounds that it was time-barred pursuant to CPLR 7511(a). Judge Sifton found that the action for a breach of its duty of representation was to be construed an attempt to set aside an arbitration award governed by New York's ninety-day statute of limitations to vacate an arbitration award pursuant to CPLR 7511(a). The Court below cited no authority in support of its decision except the case of Wallace v. AT&T, 460 F.Supp. 755(E.D.N.Y. 1978), another decision by the same Court reaching the same erroneous result.

The plaintiff appealed that decision to the United States Court of Appeals for the Second Circuit, which unanimously and properly found that the District Court's ruling that a ninety day statute of limitations to vacate an arbitration award was erroneously found to

apply in this case and that the proper statute of limitations was for breach of contract which, pursuant to New York CPLR 213(2), is six years.

In the Court of Appeals, plaintiff had argued that in the alternative, the statute of limitations should be three years for an action based upon a statutory right pursuant to CPLR 214(2).

The Court of Appeals properly found that it would be absurd to apply the statute of limitations to vacate an arbitration award to a Section 301 claim since the reason the §301 claim was brought was because there never was a proper arbitration. Under New York Law the plaintiff employee would not even have standing to challenge the arbitration award, see In re Soto, 7 N.Y.2d 397, 165 N.E.2d 855, 198 N.Y.S.2d

282 (1960), and it would be unjust to require an employee who had been discharged from his position to retain counsel and file an action against his union within 90 days. The Court further pointed out that the Supreme Court in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966) had made it clear that a six-year statute of limitations would not affect the Federal Labor Policy which the defendants argued would be threatened if an employee was given a fair opportunity to bring an action against a union who had not properly represented him.

The Second Circuit reversed the granting of summary judgment by the Court below and reinstated the plaintiff's action.

It is from the above decision by the Court of Appeals that the petition for a writ of certiorari has been filed with this Court by the petitioner.

THE REASONS FOR NOT GRANTING THE WRIT

The decision by the Second Circuit is conceptually sound and arrives at a fair and just result.

Every Circuit Court which has considered the question of what statute of limitations to apply has reached the same result as that reached by the Second Circuit. See, Gray v. International Assoc. of Heat and Frost Insulators and Asbestos Workers, Local No. 51, 416 F.2d 313 (6th Cir. 1969); Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978); Price v. Southern Pacific Transportation Company, 586 F.2d 750 (9th Cir. 1978); and Howard v. Aluminum Workers International Union and Local 400, 589 F.2d 771 (4th Cir. 1978). District courts who properly con-

sidered the question had reached the same result, Canada v. United Parcel Service, Inc., 446 F.Supp. 1048 (N.D. Ill. 1978); and the only New York State case which peripherally considered the issue, Jackson v. Regional Transit Service, 54 A.D.2d 305, 388 N.Y.S. 2d 441 (4th Dept. 1976), reached the same result.

Simple logic likewise requires the same result, since an unfair representation claim can arise in situations where an arbitration proceeding is never held, for example, where the union refuses to take the case to arbitration in the first place. As the Supreme Court stated in Hines v. Anchor Motor Freight, Inc., 424 U.S. 544 (1976),

> "To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to

fairly represent the employee. In neither case, does the employee receive fair representation." 424 U.S. at 572 (emphasis supplied)

There is thus no valid legal issue that the proper statute of limitations is not one to set aside an arbitration award, and the few district court cases cited by the petitioner are aberrations which had become self-perpetuating until the various circuit courts had an opportunity to rule on the matter as they have now done.

The petitioner's contention that the local courts are in conflict and confusion is based on a misreading of the lower court cases and several erroneous decisions by the district courts which, for whatever reason, were never appealed. There is no conflict between the Courts of Appeals, and no Court of Appeals has held that the proper statute of limitations is one to set aside an arbitration award.

The spectre raised by the petitioner that a six year statute of limitations threatens the Federal Labor Policy is simply a creation of petitioner's counsel who would like to cut off employees' rights before they have a realistic opportunity to obtain counsel and commence an action. The policy with regard to labor proceedings is not affected at all since the only time a §301 claim ever arises is one where the arbitration process is already broken down. If there is a valid arbitration, there never can be a valid §301 claim.

The only time a valid §301 claim arises is when the employee never had fair representation during the grievance procedure -- either the union wrongfully refused to proceed to arbitration or the union failed to properly represent the employee during arbitration, and in

those cases where there is a proper arbitration there never is a valid §301 claim. Thus, the petitioner's argument about Federal Labor Policy being thwarted is entirely unfounded.

CONCLUSION

For the reasons set forth above, we respectfully urge that the petition for a writ of certiorari to the United States Court of Appeals be denied.

Dated: September 3, 1980

Respectfully submitted,

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No. 80-169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When an employee's discharge has been upheld in "final and binding" arbitration and the employee seeks to relitigate his discharge with his employer in the federal courts under Section 301 of the Labor Management Relations Act on the ground that the union failed him in its duty of fair representation, did not the court of appeals err in determining that the suit was governed by the six-year statute of limitations for actions on contracts and, therefore, was not barred by the ninety-day limitation on actions to vacate arbitration awards?

PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were United Parcel Service, Inc. (petitioner in this Court), William Mitchell (respondent in this Court), and Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (co-appellee with petitioner in the court of appeals).

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No. 80-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Petitioner, United Parcel Service, Inc.,[1] hereby submits its brief on the merits in the above matter.

1. Pursuant to Supreme Court Rule 28.1, United Parcel Service states that it is a wholly owned subsidiary of United Parcel Service of America, Inc. United Parcel Service of America, Inc. is affiliated with Service Plants Corporation ("SPC"), a holding company whose subsidiaries (all wholly-owned) own and lease real estate to UPS. Owners of UPS capital stock own beneficial interests in SPC common stock.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (A. 128-A. 130),[2] granting defendants' motion for summary judgment, has not been officially reported. The opinion of the United States Court of Appeals for the Second Circuit (A. 132-A. 140), reversing the order of the district court, has been reported at 624 F. 2d 394 (2d Cir. 1980).

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1980. (A. 5). United Parcel Service filed a timely petition for rehearing, which was denied on May 7, 1980. (A. 6). On August 5, 1980, within ninety days of the date the court of appeals denied the petition for rehearing, United Parcel Service filed a timely petition for a writ of certiorari. 28 U. S. C. § 2101(c); Supreme Court Rules 20.2 and 20.4.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), provides in pertinent part as follows:

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2. References to the Joint Appendix shall be "A.," followed by the page number.

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

Section 12 of the United States Arbitration Act, 9 U. S. C. § 12, provides in pertinent part as follows:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

Section 7511(a) of the New York Civil Practice Laws and Rules, N. Y. Civ. Prac. Law § 7511(a) (McKinney), provides as follows:

> When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

Section 213 of the New York Civil Practice Laws and Rules, N. Y. Civ. Prac. Law § 213 (McKinney), provides in pertinent part as follows:

> The following actions must be commenced within six years: . . .
>
> (2) An action upon a contractual obligation of liability express or implied, except as provided in Article 2 of the Uniform Commercial Code. . . .

STATEMENT OF THE CASE

Respondent William Mitchell ("Mitchell") was employed by petitioner United Parcel Service, Inc. ("UPS") as a car washer at UPS' facility in Staten Island, New York. He was discharged by UPS on January 13, 1977 for falsifying his time cards and claiming payment for hours which he did not work. Specifically, on six separate dates he submitted time cards showing that he had worked at least his full eight hours, despite the fact that on each date he had been observed by UPS supervisors leaving his job several hours prior to its completion. (A. 41).

Mitchell denied the charges against him and requested that his union, the Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (the "Union"), file a grievance against UPS on his behalf contesting the discharge. UPS and the Union are parties to a collective bargaining agreement which governs the bases upon which employment may be terminated and which contains a grievance and arbitration procedure for the resolution of disputes covered by the agreement. (A. 58-A. 61, A. 65-A. 67).

Pursuant to the collective bargaining agreement, Mitchell's grievance was submitted to a panel of the Atlantic Area Parcel Grievance Committee (the "Joint Panel"). Mitchell was represented by the Union at a full hearing on the grievance before the Joint Panel.

On February 16, 1977, the Joint Panel issued an award holding that UPS had not violated the agreement by discharging Mitchell and denied the grievance. (A. 74-A. 75). Under the terms of the collective bargaining

agreement, the decision of the Joint Panel upholding the discharge is final and binding. (A. 60, A. 66).[3]

Seventeen months after the Joint Panel sustained the discharge, Mitchell instituted this suit pursuant to Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. § 185(a), and **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976). The complaint alleged that UPS had discharged Mitchell in violation of the collective bargaining agreement and that the Union had failed to represent him fairly in the grievance and arbitration process.

Under **Hines**, an employee contesting a discharge sustained by an arbitration award can prevail only if he establishes both that the discharge was contrary to the collective bargaining agreement and that the union's breach of its duty of fair representation "seriously undermine[d] the integrity of the arbitral process." 424 U. S. at 567.

The Decision of the District Court

Both UPS and the Union moved for summary judgment in the district court on the ground that the action was barred by the ninety-day statute of limitations for actions to vacate arbitration awards. N. Y. Civ. Prac. Law § 7511(a) (McKinney). The district court granted defendants' motion and dismissed the complaint, agreeing with the defendants that an action seeking reinstatement

3. Joint panel arbitration awards have the same legal effect for the purpose of the statute of limitations as awards rendered by individual arbitrators. *See, e.g.*, **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976), in which the arbitration award at issue had been rendered by a joint area committee. *See also* **Humphrey v. Moore**, 375 U. S. 335 (1964); **General Drivers, Local Union No. 89 v. Riss & Co.**, 372 U. S. 517 (1963); **Walters v. Roadway Express, Inc.**, 557 F. 2d 521, 524 (5th Cir. 1977); **Barbarino v. Anchor Motor Freight, Inc.**, 421 F. Supp. 1003, 1006 (W. D. N. Y. 1976).

and damages following an adverse arbitration decision is properly characterized as a suit to vacate an arbitration award. The district court reasoned that the relief sought had been denied in an award "issued as a result of a full-scale, arbitration proceeding" and that the effect of any judicial relief "would be to vacate the determination of the arbitrators."

The district court rejected the argument that the ninety-day statute of limitations was "too short," in view of the fact that the federal Arbitration Act, 9 U. S. C. § 12, likewise provides a three-month statute of limitations. It also reasoned that the application of the ninety-day statute of limitations was consistent with the federal labor policy favoring relatively rapid resolution of labor disputes through final and binding arbitation.

The Decision of the Court of Appeals

On appeal, the court of appeals rejected the district court's characterization of the action as a suit to vacate an arbitration award and held that the six-year statute of limitations for contractual breaches, N. Y. Civ Prac. Law § 213(2) (McKinney), was applicable. Despite the fact that Mitchell's complaint sought the same relief (reinstatement with back pay) that had been denied him by the arbitration panel, the court of appeals held that the ninety-day statute of limitations governing proceedings to vacate arbitration awards was inapplicable. It reasoned that Mitchell's action was more in the nature of a breach of contract action than an action to vacate an arbitration award, in part because it believed that Mitchell lacked standing under state law to vacate an arbitration award. The court of appeals therefore reversed the district court's dismissal of the action.

SUMMARY OF ARGUMENT

Since Section 301 of the Labor-Management Relations Act does not contain its own statute of limitations, the federal courts in suits brought under that section must apply the appropriate state statute of limitations, while at the same time making sure that application of the state statute of limitations does not frustrate federal labor policy. The ninety-day New York state statute of limitations for proceedings to vacate arbitration awards is the most appropriate limitations period to apply, since Mitchell's action seeks in effect to overturn an adverse arbitration decision. Moreover, application of a six-year statute of limitations would frustrate labor policy by undermining the economy, speed and desirability of arbitration and by permitting the tardy assertion of claims seeking to overturn arbitration awards. In many arbitrations, highly significant and overriding concerns are involved, and six-year delays would be intolerable as a standard in labor-management relations.

ARGUMENT

I. Since Mitchell Can Prevail in This Action Only by Having the Arbitration Award Overturned, the Court of Appeals Erred in Failing to Characterize the Action, for Purposes of the Statute of Limitations, as One to Vacate an Arbitration Award.

In suits brought pursuant to Section 301 of the Labor-Management Relations Act, a federal district court must apply the relevant statute of limitations of the state in which it sits, since Congress never enacted any federal statute of limitations for such suits. As this Court has held, "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." **International Union, UAW v. Hoosier Cardinal Corp.**, 383 U. S. 696, 704-05 (1966).

The issue before this Court is whether the ninety-day statute of limitations contained in Section 7511(a) of the New York Civil Practice Laws and Rules applies, as petitioner urges, or the six-year statute of limitations contained in CPLR § 213, as the court of appeals held. The former statute of limitations applies to proceedings "to vacate or modify" an arbitration award, whereas the latter applies to actions "upon a contractual obligation of liability express or implied . . ."

The court of appeals erred in failing to apply the ninety-day statute of limitations contained in CPLR § 7511(a), since Mitchell's action against UPS properly can be characterized only as an action to vacate an arbitration award. Mitchell's suit alleges the same wrong by UPS (breach of the collective bargaining agreement's requirement that an employee may be discharged only for just cause) that he alleged without success in arbitration,

and he seeks the same relief (reinstatement with full back pay) denied him by the arbitration panel. Thus, in order for him to prevail in his action, he necessarily will have to persuade the court to vacate the "final and binding" decision of the Joint Panel. *See* **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976).

In enacting CPLR § 7511, the State of New York adopted a policy in support of the finality of arbitration, requiring that any challenge to an arbitration award be made expeditiously. That this policy is applicable here is manifest from the statutory language. Among the grounds for vacating an arbitration award set forth by CPLR § 7511 are "corruption, fraud or *misconduct in procuring the award.*" (Emphasis added).[4] Mitchell's claim is premised on the allegation that the Union's misconduct in prosecuting his grievance before the Joint Panel entitles him to a judgment that would vacate the Panel's award.

In its purpose, Mitchell's lawsuit is indistinguishable from an action under CPLR § 7511 to vacate an arbitration award. A former employee should not be allowed to prosecute a claim seeking in essence an order vacating an arbitration award, and hence to circumvent the limitations provision of CPLR § 7511, through the expedient of camouflaging his allegations and avoiding use in his complaint of the specific words "vacate the arbitration award." Here, as in **Liotta v. National Forge Co.**, — F. 2d —, 105

4. Both the grounds and time limit for vacating an arbitral award under the federal Arbitration Act are likewise limited. 9 U. S. C. § 10 provides that an award may be vacated, *inter alia*, where it was procured by corruption, fraud or undue means or where "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon good cause shown." 9 U. S. C. § 12 requires that motions to vacate be served within three months of the date of the award.

LRRM 2636 (3d Cir. Sept. 10, 1980), which reached a result contrary to that reached in the case now under review,[5] "a fair reading of [the employee's] complaint demonstrates that he seeks to vacate the arbitrator's decision" since "he sought to litigate before the district court the same claim he presented for arbitration, that of improper discharge." The court in **Liotta** continued:

> Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. *Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset*

5. A vast majority of the lower court decisions (including several district court decisions in the Second Circuit which were overruled by the decision of the court below) support petitioner's position and reached results contrary to that of the court below. *See, e.g.*, **Local 800 v. Lakeshore Motor Freight Co.**, 102 LRRM 2046 (W. D. Pa. 1979) (applying Pennsylvania's three-month limitation period); **Pizzuto v. Hall's Motor Transit Co.**, 409 F. Supp. 427 (E. D. Va. 1976) (federal Arbitration Act's three-month limitation); **DeLorto v. United Parcel Service, Inc.**, 401 F. Supp. 408 (D. Mass. 1975) (Massachusetts' thirty-day limitation); **UMW v. Jones & Laughlin Steel Corp.**, 378 F. Supp. 1206 (W. D. Pa. 1974) (Pennsylvania's three-month limitation); **Lunceford v. Western Conference of Teamsters**, 87 LRRM 2011 (C. D. Calif. 1974) (California's 100-day limitation); **Teamsters Local 249 v. Motor Freight Express, Inc.**, 356 F. Supp. 724 (W. D. Pa. 1973) (Pennsylvania's three-month limitation); **Howerton v. J. Christenson Co.**, 76 LRRM 2937 (N. D. Calif. 1971) (California's 100-day limitation). *See also* **Teamsters, Local 135 v. Jefferson Trucking Co.**, 628 F. 2d 1023, 1027 (7th Cir. 1980) (holding that, in action by union to enforce arbitration award, employer had waived defense by failing to move to vacate award within three month period established by Indiana law). *But see* **Smart v. Ellis Trucking Co.**, 580 F. 2d 215 (6th Cir. 1978), *cert. denied*, 440 U. S. 958 (1979).

the arbitrator's decision that the Company did not wrongfully discharge him.

105 LRRM at 2637 (emphasis added).[6]

The court of appeals in the instant case held that Section 301 suits following arbitration awards could not be characterized as actions to vacate those awards, to which the ninety-day statute of limitations contained in CPLR § 7511(a) must be applied. Instead, relying on its reading of this Court's decision in **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976), the court of appeals concluded that, despite the presence of an intervening arbitration award, the action was merely one for breach of an employment contract. However, it is more consistent with **Hines** to characterize Section 301 suits filed after adverse arbitration awards as suits to vacate such awards. This Court in **Hines** did not describe the issue before it in terms of the underlying contractual protections against wrongful discharge. Instead, the majority opinion, as well as the concurring and dissenting opinions, all described the issue as one of determining the conditions under which the finality provisions of the arbitration provisions of the collective bargaining agreement must be enforced. *See* 424 U. S. at 560-61, 567, 571 (opinion of the Court), 572 (concurring opinion of Justice Stewart); 575 (dissenting opinion of Justice Rehnquist).[7] The issue in this case and simi-

6. The opinion in **Liotta** is reprinted in the appendix to the Supplemental Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, which UPS filed on September 25, 1980.

7. Similarly, in **Humphrey v. Moore**, 375 U. S. 335 (1964), which formed one basis for the decision in **Hines**, this Court phrased the issue as "whether the Kentucky Court of Appeals properly enjoined implementation of the decision of a joint employer-employee committee purporting to settle certain grievances . . . ." 375 U. S. at 336.

lar cases, then, is whether and under what circumstances an arbitration award rendered pursuant to a collective bargaining agreement will be set aside, and not whether the courts will enforce contractual provisions against wrongful discharge. Thus, the decision of the court of appeals reflects a misreading in this Court's decision in **Hines** which, as noted in Part II *infra*, threatens widespread damage to labor-management relations.

Moreover, the decision of the court below flies in the face of the familiar canon of statutory construction that, in the event of a conflict between a general statute and a more specific statute, the more specific statute applies in the absence of evidence of contrary legislative intent. *See, e.g.*, 2A Sutherland, **Statutes and Statutory Construction,** § 51.05 (Sands rev. ed. 1973). As this Court held in **Morton v. Mancari,** 417 U. S. 535, 550-51 (1974): "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, . . ." *See also* **Radzanower v. Touche Ross & Co.,** 426 U. S. 148 (1976) (specific venue provision of the National Bank Act prevails over the general venue provision in the Securities Exchange Act), and **Preiser v. Rodriguez,** 411 U. S. 475, 488-90 (1973) (more specific habeas corpus remedy takes precedence over the general terms of 42 U. S. C. § 1983).

An instructive case applying this principle in the context of statutes of limitation is **Lashlee v. Sumner,** 570 F. 2d 107 (6th Cir. 1978), which held that, in an action alleging libel, negligence, interference with contractual relations and intentional infliction of emotional distress, the entire action was subject to the specific statute of limitations for libel because the gist of the action was for libel. Applying Kentucky law, the court held that "a specific statute of limitations covers all actions whose real pur-

pose is to recover for the injury addressed by it in preference to a general statute of limitations." *Id.* at 109.

In the case at bar, it is evident that CPLR § 7511(a) is more specific than the general breach of contract statute of limitations, and that it is applicable because the "gist" and "real purpose" of Mitchell's action is to vacate the award of the Joint Panel. Since CPLR § 7511(a) addresses Mitchell's action more specifically than does New York's six year statute of limitations for breach of contracts, CPLR § 7511(a) should govern.

In rejecting petitioner's reliance on CPLR § 7511, the court of appeals also reasoned that Mitchell would not have had standing to bring an action to vacate the arbitration award under New York law and that the limitation period provided by CPLR § 7511 was therefore inapplicable to this Section 301 action. (A. 138). Whether or not the court of appeals' analysis of New York law was correct, its reasoning is at odds with basic principles of federal law. This case is before the federal courts on Mitchell's claim of Section 301 jurisdiction. Section 301, as interpreted in **Vaca v. Sipes,** 386 U. S. 171 (1967), and **Smith v. Evening News Association,** 371 U. S. 195, 198-200 (1962), grants him standing to maintain the instant action. Thus, Mitchell's standing is not at issue; the issue, rather, is which of two *statutes of limitations* is more appropriate.

In applying a state statute of limitations, "federal courts borrow only the chronometric aspects and not the procedural or substantive nuances of the law of the forum." **Wolf v. Frank,** 477 F. 2d 467, 475 (5th Cir.), *cert. denied,* 414 U. S. 975 (1973). Furthermore, the federal court is not applying state law. Rather, "[i]n borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto,

on the prosecution of *a closely analogous* claim." **Johnson v. Railway Express Agency, Inc.**, 421 U. S. 454, 464 (1975) (emphasis added). As this Court stated in **International Union, UAW v. Hoosier Cardinal Corp.**, *supra*, "the characterization of this action for the purpose of selecting the appropriate state limitations is ultimately *a question of federal law.*" 383 U. S. at 706 (emphasis added). Thus, the question in this case (which, as noted above, must be answered in the affirmative) is whether *as a matter of federal law* this Court should characterize Mitchell's action as one to vacate an arbitration award, not whether Mitchell would have had standing had he brought suit in state court.

In sum, the instant case is nothing more than a belated application to set aside the decision of the Joint Panel, as the district court properly concluded. Since Mitchell did not commence this lawsuit until more than fourteen months after the statutory time limit expired, the decision of the court of appeals should be reversed.

II. By Permitting Attacks on Arbitration Awards Years After They Are Made, the Decision of the Court of Appeals Threatens Federal Labor Policy.

Congress and this Court have expressly endorsed contractual arrangements to resolve labor disputes. Section 203(d) of the Labor Management Relations Act, 1947, 29 U. S. C. § 173(d) (1978), states in pertinent part:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

Similarly, this Court has affirmed the importance of arbitration as "a stabilizing influence" necessary to effectuate industrial self-government and labor peace.[8] It has endorsed final and binding arbitration as "the substitute for industrial strife" and as "a major factor in achieving industrial peace."[9] The value placed by this Court on arbitration in the labor-management field is evident from the extremely limited scope of judicial review accorded arbitration awards.[10] Consequently, parties to collective agreements rely on the finality of arbitration as protection from litigation of labor disputes.

The importance of finality in arbitration has been almost universally recognized. Not only does the Federal Arbitration Act provide a ninety-day statute of limitations, but 42 states have special short limitations for actions to vacate arbitration awards, 28 of them ninety days and nine of them even shorter.[11] Similarly, as the cases cited in note 5 indicate, apart from the decision below and a similar decision in the Sixth Circuit, all of the courts which have faced the issue have resolved the question in favor of the short arbitration statute of limitations in Section 301 cases following arbitration awards.

The reason is clear. Labor-management relations depend upon the quick and final resolution of the multitude of disputes which occur almost daily in the relationship between employees, union, and employer. Often these questions involve contract interpretations with

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8. *See, e.g.*, **United Steelworkers v. American Mfg. Co.**, 363 U. S. 564, 567 (1960); **United Steelworkers v. Warrior & Gulf Navigation Co.**, 363 U. S. 574, 580, 581 (1960).

9. **Warrior & Gulf**, *supra*, 363 U. S. at 578.

10. *See* **United Steelworkers v. Enterprise Wheel & Car Corp.**, 363 U. S. 593, 596 (1960).

11. *See* A. 18-A. 19 of Appendix to UPS's Petition for a Writ of Certiorari.

broad impact; always they involve grievances which, absent arbitration, would threaten strikes. If arbitration awards remain subject to challenge for six years, the necessary prompt resolution of disputes will not be available.

A. A Six-year Statute of Limitations Would Seriously Detract from the Speed, Economy and Fairness of Arbitration, and Hence Discourage Arbitration as a Means of Resolving Labor Disputes.

In **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976), this Court created a limited exception to the finality of arbitration awards, holding that the bar to finality is lifted only when the process culminating in an arbitration award has been fundamentally subverted as a result of a union's breach of its duty of fair representation. So long as challenges to arbitration awards must be brought promptly, this exception does not undermine the strong federal policy favoring arbitration as a means of resolving labor disputes. However, a six-year statute of limitations on actions which permit relitigation of matters which had been resolved by arbitration takes away the principal benefits of arbitration as a means of resolving labor disputes—speed, economy, and fairness. Employers surely will become less willing to arbitrate disputes if they know that they can be faced with claims seeking up to six years of back pay even after they have prevailed in arbitration. Furthermore, discharged employees effectively could nullify arbitration awards merely by waiting six years to bring suit. By that time the reality of faded memories, lost records, litigation costs and potential monetary liability of six years of accumulated back pay might force an employer, even though it had prevailed at arbitration, to settle for an amount exceeding what an arbi-

trator could have awarded.[12] Under the court of appeals' decision, simply by alleging the absence of fair representation, an employee can impose on employer and union alike the cost of extensive litigation years after both believed the issue had been finally resolved.

The application of a six-year limitation period to **Hines** actions thus will undermine the stability of the private settlement machinery and increase the likelihood of industrial strife. If a discharged employee were to succeed and be reinstated some six years after his discharge, his victory might impinge on the legitimate expectations of other employees, as by requiring the displacement of the employee who filled the plaintiff's job for the six year period following his discharge. Furthermore, if arbitration awards remain open to relitigation for six years, parties to the labor contract may well be unsure as to the meaning of its terms for that period. For example, even if an arbitrator were to hold that a particular type of conduct constituted "just cause" for a discharge under the collective bargaining agreement, an employer for six years still could not safely discharge other employees guilty of the same conduct. In short, an employer can rely on arbitration awards only at its peril until six years have passed.

This uncertainty as to the meaning of contractual language will make contract negotiations more difficult. Grievances that are not finally resolved for six years may create industrial unrest, and disaffected employees have more time to bring suit to harass both employer and union. On a more practical every day level, prevailing in an arbitration means little. Every time the employer wins

12. In the instant case, the Joint Panel rendered its decision approximately one month after Mitchell's discharge. Had the Joint Panel awarded him complete relief, UPS's monetary liability would have been only one month of back pay.

an arbitration, neither the union nor the company can safely destroy its files for six years; the union must remain prepared to prove that it fairly represented its member, and the company that its actions which led to the arbitration were proper.

Finally, the decision of the court of appeals takes a substantial element of fairness out of the arbitration of grievances. If the employer loses the arbitration, it has ninety days to challenge the award.[13] By contrast, if it prevails in the arbitration, it must be prepared to relitigate the issue for six years. For the employee, a favorable decision is final after three months; for the employer, a favorable decision does not become final until six years after the incident that had been arbitrated.

Since under the court of appeals' decision arbitration will retain its quality of expeditious finality only when the employer loses, it is reasonable to expect that many employers will abandon or sharply curtail labor arbitration as a means of resolving disputes. As a result, labor disputes which traditionally have been decided by arbitration will increasingly be fought out in the streets, through strikes and other work disruptions, and in the courts.

Even if this scenario does not result from the decision below, the absence of arbitral finality will place a severe strain on management-union relations. The myriad disputes which the parties in the past have been able to resolve by expeditious and final arbitration now will be suspended in limbo for six years while aggrieved employees decide whether to challenge the award in court. Such arbitrations are not limited to relatively simple discharge claims. They may involve a class of grievants, and the results may directly affect the employment or seniority status of hundreds, and perhaps thousands, of

13. *See, e.g.*, **Teamsters Local 135 v. Jefferson Trucking Co.**, 628 F. 2d 1023 (7th Cir. 1980).

employees. Under the court of appeals' decision, management and the union will no longer be able to obtain an expeditious and final resolution of such disputes.

B. The Court of Appeals' Decision Is Contrary to Federal Labor Policy, Which Encourages Prompt Resolution of Employee Grievances.

Both this Court and Congress have recognized the wisdom of requiring prompt resolution of employee grievances. As this Court stated in **International Union, UAW v. Hoosier Cardinal Corp.**, 383 U. S. 697, 707 (1966):

> [R]elatively rapid disposition of labor disputes is a goal of federal labor law. Since the state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to § 301 actions comports with that goal.

See also **Liotta v. National Forge Company**, — F. 2d —, 105 LRRM 2636, 2637 (3d Cir. Sept. 10, 1980), and **Teamsters, Local 135 v. Jefferson Trucking Co.**, 628 F. 2d 1023, 1027 (7th Cir. 1980).

The court of appeals based its conclusion in part on an erroneous reading of this Court's opinion in **Hoosier Cardinal.** First, the court construed **Hoosier Cardinal** as indicating that a six-year statute of limitations "adequately furthered" the federal policy in favor of rapid resolution of labor disputes. However, the only issue before this Court in **Hoosier Cardinal** was whether the appropriate statute of limitations was twenty years (as plaintiffs argued) or six years (as defendants argued). Given that choice, the Court found six years applicable. Since **Hoosier Cardinal** did not involve an action seeking to overturn an arbitration award, the impact of a six-year

statute of limitations on the federal policy of encouraging arbitration was not at issue. The court of appeals also erred in relying on a footnote in **Hoosier Cardinal** (383 U. S. at 707 n. 9), which stated that "[o]ther questions would be raised" if "an unusually short or long limitations period" were applicable to a Section 301 action to recover employee vacation pay. Since **Hoosier Cardinal** did not involve a challenge to an arbitration award, the Court in that case did not give any indication as to how such "questions" might be resolved where, as here, the action follows an arbitration award.

The court of appeals also reasoned that it was "unwarranted" to require a discharged employee to obtain new counsel and file a lawsuit within ninety days of the arbitration award.[14] As an initial matter, the court's reasoning is seriously flawed in light of the circumstances of this case, since Mitchell in fact engaged counsel on February 16, 1977, the date the Joint Panel rendered its award. (A. 72). Moreover, the court of appeals overlooked the fact that, where Congress has enacted statutes of limitations for actions in the employment area (as it has not done for actions arising under Section 301), it uniformly has chosen short statutes of limitations. Thus, had Mitchell filed an unfair labor practice charge with the National Labor Relations Board claiming that the Union's conduct in this case constituted a breach of its

14. Actually, the court of appeals stated: "To require an employee—who is suddenly out of work—to obtain new counsel and file an action against his union and employer all within 90 days *of his discharge* strikes us as unwarranted." (A. 138) (emphasis added). In so posing the question, the court of appeals clearly was mistaken. Petitioner never urged that Mitchell had to file suit within ninety days of his discharge; rather, petitioner argues that Mitchell had to file suit within ninety days of the date of the *arbitration award.*

duty of fair representation, he would have been bound by a six-month statute of limitations. *See* 29 U. S. C. § 160(b). Similarly, under Title VII of the Civil Rights Act of 1964, a plaintiff must file his lawsuit within ninety days of exhausting administrative remedies with the Equal Employment Opportunity Commission. *See* 42 U. S. C. § 2000e-5(f)(1).[15] Since Congress obviously believes that ninety days is a sufficient period of time for a layman to obtain a lawyer and file a Title VII action after unsuccessful exhaustion of administrative remedies, the court of appeals erred in concluding that it was "unwarranted" to require a discharged employee to file an action within ninety days after unsuccessful exhaustion of contractual remedies.

Finally, in connection specifically with arbitration awards, Congress likewise has clearly expressed its intent that suits to vacate such awards be brought promptly. *See* United States Arbitration Act, 9 U. S. C. § 12, which provides a three month statute of limitations.[16] Thus, if this

15. Attempted exhaustion of contractual remedies (*i.e.*, resort to the grievance-arbitration machinery) is just as much a prerequisite to a Section 301 action as exhaustion of administrative remedies is a prerequisite to a Title VII action. *Compare* **Republic Steel Corp. v. Maddox,** 379 U. S. 650 (1965), *with* **Love v. Pullman,** 404 U. S. 522, 523 (1972), *and* **McDonnell Douglas Corp. v. Green,** 411 U. S. 792, 798 (1973). Thus, the ninety-day period provided in CPLR § 7511 is closely analogous to the ninety-day period provided in 42 U. S. C. § 2000e-5(f)(1).

16. Because of this Court's mandate in **Hoosier Cardinal** that a federal court should look to *state* law in determining the appropriate statute of limitations in Section 301 actions, the principal focus of the arguments below and in this Court has centered on which of two New York state statutes of limitations is applicable. UPS notes, however, that despite the ambiguous exclusionary language in 9 U. S. C. § 1 (excluding from the scope of the federal Arbitration Act arbitration of disputes arising under contracts of

Court were to look to the United States Arbitration Act "for guidance," as the court did in **Pizzuto v. Hall's Motor Transit Co.**, 409 F. Supp. 427 (E. D. Va. 1976), it should agree that a limitations period of three months is appropriate.

In sum, the court of appeals decision places a severe strain on collective bargaining and causes considerable confusion as to the meaning of contractual terms by precluding the parties from being able to rely on arbitration awards for a six year period. Furthermore, affirmance of the decision below not only would threaten the arbitration process by making arbitration a much less desirable and useful vehicle for resolving disputes in the field of collective bargaining, but also would be contrary to the recognition by this Court and by the Congress that disputes in the employment and arbitration contexts should be resolved promptly.

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16. (Cont'd.)

employment), several courts have held that the federal Arbitration Act applies to arbitration of grievances arising under collective bargaining agreements. *See, e.g.*, **Local 205, Electrical Workers v. General Electric Co.**, 233 F. 2d 85, 100 (1st Cir. 1956), *aff'd on other grounds*, 353 U. S. 547 (1957); **Communications Workers v. Pacific Telephone Co.**, 462 F. Supp. 736 (C. D. Calif. 1978).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to reverse the judgment of the court of appeals and to direct the reinstatement of the judgment of the district court that had dismissed the complaint with prejudice.

Respectfully submitted,

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No. 80-169

In The

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

-against-

WILLIAM MITCHELL,

Respondent.

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. What is the appropriate Statute of Limitations to be applied to an action brought by an employee against his union, pursuant to 29 U.S.C. 185, where the employee alleges that the union failed to properly represent him during a grievance proceeding, and particularly the arbitration segment thereof, regarding his claim of wrongful discharge by the employer, and a concurrent action by the employee against the employer alleging breach of contract?

2. Where an employee's action against his union alleges that his union failed to properly represent him during a grievance proceeding, and particularly the arbitration segment thereof, is it fair or logical to label the employee's statutory action (29 U.S.C. 185) as an

attempt "to vacate an arbitration award" and to apply the 90 day statute of limitations applied to actions to vacate arbitration awards?

3. In a statutory (29 U.S.C. 185) "unfair representation" action brought by a New York employee against his union alleging that the union failed to properly represent him during a grievance proceeding, and particularly the arbitration segment thereof, is it fair or logical to label his statutory claim as "an attempt to vacate an arbitration award" when under New York Law [In Re Soto, 7 N.Y.2d 397, 198 N.Y.S.2d 282 (1960)] the employee would not even have standing to challenge the arbitration award, much less move to vacate it?

4. Where an employee commences a statutory action (29 U.S.C. 185) against

his union for "unfair representation" and a concurrent claim for relief against his employer for breach of contract based upon the Collective Bargaining Agreement, should the same statute of limitations apply against both defendants?

5. Where an employee commences a statutory action (29 U.S.C. 185) against his union for "unfair representation" and a concurrent claim for relief against his employer for breach of contract, should a different statute of limitations be applied depending on whether or not the union breached its duty of fair representation by refusing to proceed to arbitration in the first place or subverted the arbitration process by failing to fairly represent the employee?

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No. 80-169

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

---

BRIEF FOR RESPONDENT

Respondent, William Mitchell, hereby submits his brief on the merits in the above matter.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions referred to in the petitioner's brief, respondent believes the following statutory provisions are involved:

Section 214(2), (5) and (6) of the New York Civil Practice Law and Rules (CPLR), which provides as follows:

> "The following actions must be commenced within three years:
>
> 2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215;
>
> 5. an action to recover damages for a personal injury except as provided in section 215;
>
> 6. an action to recover damages for malpractice, other than medical malpractice;..."

STATEMENT OF THE CASE

The respondent William Mitchell ("Mitchell") was employed by the petitioner,

United Parcel Service, Inc. ("UPS") since 1964 (A77). At the time of the occurrence complained of, Mitchell was employed as a car washer at the UPS facility in Staten Island, New York and was a member of the respondent union, the Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 (the "Union") (A77).

Throughout 1976 and 1977, UPS had undertaken a program to eliminate full time employees and replace them with part timers (A8).

On or about January 13, 1977, UPS discharged Mitchell for allegedly falsifying time cards and claiming payment for hours which he had not worked (A77). The Union claimed that its supervisors had witnessed him leaving his job earlier than his time card reflected (A77).

At all times, Mitchell denied the charges and made the Union aware of witnesses who could support his position (A78).

Initially, at the January 13, 1977 meeting, Mitchell's Union representative, Purcell, did not appear, claiming he was busy with contract negotiations in Washington and had no time to investigate Mitchell's matter (A80). Although the basis of UPS' claim was that Mitchell must have found a way to tamper with the time clock, the Union did nothing and did not even bother to check the time clock and determine if it operated properly (A81).

The Union did file a perfunctory grievance on Mitchell's behalf (A81). As a result of the grievance, a hearing was scheduled to take place in Virginia

Beach, Virginia, on February 16, 1977 (A81)*.

Admittedly, Mitchell was not advised where or when the hearing would take place until the afternoon of February 14, 1977, when Mitchell was sent a telegram reading as follows:

> "Please be advised that your grievance against United Parcel Service concerning your discharge will be heard by the panel on Wednesday February 16 1977 in Virginia Beach Virginia if you wish to attend you must assume all your expenses please advise" (A90).

By this time, Mitchell had been out of work for more than six weeks, had no funds to get to Virginia, could not possibly obtain witnesses on such notice or obtain counsel and was due to appear at the Welfare Department on that very day to obtain eating

---

*It should be kept in mind that the respondent lived and worked in New York, all of the witnesses were in New York and at no time prior to Mitchell's case had any part of the grievance been held away from the New York area (A82).

money for his family (A82)*.

Upon receiving the telegram, Mitchell requested the Union to adjourn the hearing or at the very least supply him with funds so that he could attend, which the Union refused (A82).

At the hearing, the Union made a mockery of Mitchell's position. The Union advised the panel that Mitchell was in fact guilty but that the penalty of discharge was too severe (A83). Then, in complete contradiction to the position the Union had just presented, it provided the panel with a copy of Mitchell's own statement wherein Mitchell continued to profess his innocence (A83).

Significantly, at the hearing the panel requested to know where Mitchell was,

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*The Union admits that they were aware that the grievance would take place in Virginia at least as early as February 10, 1977 (A84).

and the Union representative simply stated that Mitchell was not there (A85). Mitchell was then advised that his grievance had been denied and his discharge upheld and "that's the way it goes" (A82). When Mitchell requested a copy of the minutes of the hearing, the Union refused to provide them (A82).

Approximately 17 months after he was advised that he had been discharged in absentia at the Virginia Beach hearing, Mitchell retained counsel and commenced an action against the Union pursuant to Section 301(a) of the Labor - Management Relations Act, 29 U.S.C. 185(a), alleging that the Union had failed to properly represent him during a grievance proceeding, including the arbitration segment of that proceeding, and that the employer, UPS, had discharged Mitchell in violation of the collective bargaining agreement (A14-A15).

In Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), this Court had specifically stated that such an action could be brought where an employee claims that his discharge was contrary to the Collective Bargaining Agreement and that the union's breach of its duty of fair representation had prevented him from properly contesting that discharge during a grievance proceeding.

The Decision of the District Court

Both UPS and the Union moved for summary judgment in the district court on the ground that the action was allegedly barred by the 90 day statute of limitations for actions to vacate an arbitration award, New York CPLR 7511(a). The district court, in an unreported decision, granted the defendants' motion relying entirely upon

its own prior decision in Wallace v. AT & T, 460 F.Supp. 755 (E.D.N.Y. 1978). The District Court granted the defendants' motion and dismissed the complaint on the grounds that if Mitchell was awarded relief, the effect "would be to vacate the determination of the arbitrators" and therefore reasoned that the proper statute of limitations to be applied is the ninety-day statute of limitations applicable to actions to vacate an arbitration award.

The Decision of the Court of Appeals

On appeal, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court and held that to apply the ninety-day statute of limitations used to vacate arbitration awards to a Section 301 claim is improper, practically unfair and conceptually unsound.

The Court found that the proper statute of limitations to be applied was a six-year statute of limitations for breach of contract, New York CPLR 213(2), and that the mere fact that an arbitrator's decision may have been rendered during the course of the grievance procedure does not convert the 301 action to a proceeding to vacate an arbitration award.

SUMMARY OF ARGUMENT

Section 301 of the Labor-Management Relations Act does not contain its own statute of limitations. The federal courts in suits brought under that section are required to apply the most appropriate state statute of limitations.

It is the respondent's position that the state statute of limitations which should be applied is either three years or six years, but not the ninety-day statute of limitations which is applied to actions to vacate an arbitration award. The reasons are as follows:

1. A 301 action can be brought against the union and the employer in instances when the union either fails to proceed to arbitration or fails to properly represent the employee during arbitration. The mere

fact that there was an arbitral decision during the course of the grievance procedure should not convert the Section 301 claim into an action to vacate an arbitration award, particularly since this would lead to two different statutes of limitations for a Section 301 claim depending upon whether or not the grievance procedure provided for arbitration as part of the grievance procedure.

2. The arbitration procedure is between the employer and the union and under New York law, which is applicable in our case, the employee does not even have standing to challenge the arbitration award but his sole remedy is a Section 301 claim. See, In Re Soto, 7 N.Y.2d 397, 198 N.Y.S.2d 282 (1960).

3. A Section 301 claim against the union for failure to represent is a statutory claim governed by New York CPLR 214(2), which provides for a three-year statute of limitations, and in an analogous situation involving the Civil Rights Act, 42 U.S.C. 1983, which similarly creates a statutory cause of action and does not have a built-in statute of limitations, the courts have consistently applied the statute of limitations for an action brought upon the statute.

4. In an action brought against the union for a failure to properly represent the employee, the employee is not attacking the arbitration as such but the union's failure to properly represent him and is analogous to a malpractice action against an attorney for failure to properly represent a client during a

legal proceeding, which would likewise be governed by a three-year statute of limitations, New York CPLR 214(6).

5. The action against the employer is clearly a breach of contract action and is governed by New York CPLR 213(2), for which the statute of limitations is six years. If the same statute of limitations is to be applied as to both the union and employer defendants, then the six-year statute of limitations should be applied.

The petitioner's arguments that a three or six-year statute of limitations would frustrate the federal labor policy and cause chaos in management-labor relations is the type of argument frequently made in cases of this nature with no supporting facts, was made by management in Hines v. Anchor Motor Freight, Inc.,

supra, and specifically rejected by this Court, 424 U.S. at 570, and is based upon an erroneous assumption. The petitioner ignores the fact that labor unions can only exist and represent employees so long as employees believe that the union will fairly represent their interests. If employees do not receive fair representation by their union, then the very basic underpinning of the entire structure of labor-management relations will fall.

A Section 301 claim cannot be brought except where the employee has not received fair representation by his union and thus will have no effect in any instance where the union properly represents its members.

ARGUMENT

I. The Statute of Limitations to be Applied is the Most Appropriate Statute of Limitations Under New York State Law, Which is Either Three Years or Six Years, But Not Ninety Days Which is the Statute of Limitations to Vacate an Arbitration Award.

Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185, does not contain a statute of limitations which governs actions to be brought pursuant to that Act. A district court must apply the relevant statute of limitations of the state in which it sits. See, International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966).

In our case, we are dealing with a New York employee and no party has claimed that the law of any state other than New York should be applied. The petitioner

takes the position that the only two possible statutes of limitations which can be applied pursuant to New York law is either (i) New York CPLR 7511(a), a ninety-day statute of limitations applied to actions to vacate arbitration awards; or (ii) New York CPLR 213, the six-year statute of limitations for breach of contract.

The United States Court of Appeals for the Second Circuit determined that the appropriate statute of limitations was the breach of contract statute of limitations pursuant to New York CPLR 213 (624 F.2d at 398).

As was submitted by Mitchell in the Court below, the court need not choose solely between the ninety-day statute of limitations to vacate arbitration awards, New York CPLR 7511(a), or the six-year

breach of contract statute of limitations, New York CPLR 213.

New York CPLR 214(2) specifically provides that where an action is brought upon a statutory claim, a three-year statute of limitations shall be applied. In dealing with a similar statutory claim, 42 U.S.C. 1983, under the Civil Rights Act, which likewise does not have a built-in statute of limitations, the courts have made it clear that in applying New York law the apporpriate statute of limitations is three years pursuant to New York CPLR 214(2). See Meyer v. Frank, 550 F.2d 726 (2d Cir. 1977); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976); and Swan* v. Board of

*The Sixth Circuit has in fact held that, in a 301 case, the statute of limitations to be applied is one for breach of a statutory duty. See Gray v. International Assoc. of Heat and Frost Insulators and Asbestos Workers, Local No. 51, 416 F.2d 313 (6th Cir. 1969); see also, Canada v. United Parcel Service, Inc., 446 F.Supp. 1048 (N.D. Ill. 1978).

Education, 319 F.2d 56 (2d Cir. 1963).

The cases in the various circuits have characterized a 301 claim as either a tort action and applied the appropriate state tort statute of limitations; see, Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973); De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286-287 (1st Cir.) cert. denied, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed.2d 114 (1970); and Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), or the contract statute of limitations, as the Second Circuit did in this case and as the Eighth Circuit did in Butler v. Local U. 823, Int. Bro. of Teamsters, 514 F.2d 442 (8th Cir. 1975).

The Sixth Circuit in Smart v. Ellis Trucking Co., Inc., supra, applied the

Michigan three-year statute of limitations for injury to personal property to a Sectio 301 claim. The defendants in that case, as in this one, made the same argument; that the plaintiff's Section 301 claim was allegedly barred because of the Michigan statute of limitations to vacate an arbitra tion award. The Sixth Circuit disposed of that argument in language directly applicable to this case, stating,

> "The simplest answer to Ellis' argument is that Appellant's action for wrongful discharge is not in the nature of a motion to vacate or modify an arbitration award, at least to the extent that it states a claim under §301. Although the effect of a judgment for Appellant would be to nullify the arbitral decision, the §301 action is 'independent' of the grievance process. See Hines v. Anchor Motor Freight, 424 U.S. at 554, 96 S.Ct. at 1048, 47 L.Ed.2d at 231. Indeed, such a claim can be brought even before an arbitral decision where a union refuses in bad faith to process a grievance. Vaca v. Sipes,

> 386 U.S. 171, 186, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The fact that the plaintiff must show a flaw in the grievance process as a prerequisite to recovery does not alter the basic focus of the §301 claim on the propriety of the discharge itself." 580 F.2d at 219.

The petitioner, UPS, in its brief relies upon the recent case of Liotta v. National Forge Co., __F.2d __, 105 LRRM 2636 (3d Cir. Sept. 10, 1980) for the proposition that the proper statute of limitations to be applied is the statute of limitations to vacate an arbitration award. The Liotta decision relied upon several aberrational lower court decisions for that proposition and refused to follow Smart v. Ellis Trucking Co., Inc., supra, although it cited that case and was obviously aware of it.

In addition, the Liotta case is distinguishable because the court there appeared

to base its decision in large part upon the fact that the plaintiff's suit was only against the company and not the union. The Court specifically stated in Liotta,

> "Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him." (emphasis added)

Mitchell suggests that the nature of a Section 301 claim against a union is in the nature of a malpractice action--the same type of malpractice action that a client might bring against an attorney when the attorney did not represent the client properly during a court proceeding.

For example, if an attorney improperly represented a client before an arbitration tribunal resulting in an adverse decision against the client, the client could then bring a malpractice action against the attorney. The client's action against the attorney would clearly not be governed by the ninety-day statute of limitations to vacate the arbitration award but would rather be governed by a separate three-year statute of limitations pursuant to New York CPLR 214(6). The same reasoning applies to a Section 301 claim by a union member against his union for the union's failure to properly represent him during a grievance procedure.

The Second Circuit's reasoning, which has likewise been adopted by other courts of appeal, was that the six-year statute

of limitations applied because, as against the employer, the action was clearly one for breach of contract pursuant to New York CPLR 213(2), 624 F.2d at 396. Butler v. Local U. 823, Int. Bro. of Teamsters, supra, stands for the same proposition, 514 F.2d at 447. The Court then went on to state that since the statute of limitations against the employer and the Union should be the same statute of limitations pursuant to Abrams v. Carrier Corp., 434 F.2d 1234, 1252-53 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971), the same six-year limitations period should be applied to both UPS and the Union.

One thing that is clear, however, is that the ninety-day statute of limitations to vacate arbitration awards has nothing at all to do with a Section 301 claim

brought by an employee against his union and employer. In our case, it would make no difference if the proper statute of limitations is found to be three years or six years since, in any event, Mitchell's claim would be timely.

II. In a Section 301 Claim Brought Against a Union for Failing to Properly Represent an Employee, and the Employer for Breach of Contract, the Mere Fact That an Arbitral Decision May Have Been Rendered During the Course of The Grievance Proceeding Does Not Convert the 301 Claim and Breach of Contract Claim Into an Action to Vacate an Arbitration Award.

There is no doubt that an employee could bring a Section 301 claim against the union because the union either fails to commence an arbitration proceeding in the first instance, a Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967) situation, or fails to properly represent the employee

either prior to the arbitration or during the arbitration which is part of the grievance procedure.

In Hines v. Anchor Motor Freight, Inc., supra, this Court cited with approval the Ninth Circuit's statement in Margetta v. Pam Pam Corp., 501 F.2d 179 (9th Cir. 1974), stating:

> "'To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation.'"

This Court there made it clear that it would not create a distinction for Section 301 claims brought because the union wrongfully refused to proceed to arbitration and 301 claims brought because the union failed to

properly represent the employee during the arbitration which was part of the grievance procedure.

If UPS' position is upheld that where a grievance procedure contains an arbitral decision as part of that procedure then a Section 301 claim must be brought within ninety days pursuant to the statute of limitations to vacate an arbitration award, then we would be creating the very distinction which this Court in Hines stated should not be created and which will create a true state of chaos with regard to which statute of limitations should be applied to a Section 301 claim.

For example, if an employee claims that the union failed to properly represent him during the initial step in the grievance procedure and also failed to properly repre-

sent him during the arbitration step of the grievance procedure, would the employee's claim then be split in two, with the employee having three or six years to commence a Section 301 claim with regard to the union's malfeasance before the arbitration award or after it and only ninety days with regard to any complaints which the employee might have about the manner in which the union represented him during the arbitration procedure.

Similarly, if merely proceeding through the arbitral step could limit an employee's time to bring a Section 301 claim to ninety days, the real possibility exists that unions will always proceed to arbitration, although providing no meaningful representation, and thus limit the employee's time to commence a 301 claim to ninety days.

Mitchell submits that a Section 301 claim has nothing at all to do with the arbitration which was part of the grievance procedure. If the employee received proper representation, then no Section 301 claim exists. If the employee did not receive proper representation, then the mere fact that the grievance procedure contains an arbitral decision as part of that procedure should not limit the employee's time to commence a 301 action to ninety days. As the Second Circuit succinctly stated in deciding this case in the Court below:

> "The mere fact that an arbitral decision has been rendered during the course of the employee termination process does not convert the character of a § 301 action from an action for breach of contract to an action for vacating an arbitartion award." 624 F.2d at 398.

As the Second Circuit pointed out, not only is the ninety-day limitation improper and unjust to the employee, but it is conceptually unsound. Under the law of the State of New York, an employee has no standing to challenge an arbitration award rendered in a grievance proceeding between his union and his employer. In In Re Soto, 7 N.Y.2d 397, 198 N.Y.S.2d 282 (1960), the New York Court of Appeals stated in language directly applicable to this case:

> "...we made it clear that an employee could not avail himself of the arbitration procedure provided in the collective bargaining agreement since there, as here, the contract granted such right only to the union and to the employer (cf. Hudak v. Hornell Ind., 304 N.Y. 207, 106 N.E.2d 609). This was in the interest of maintaining orderly procedure under accepted principles of substantive law. At the same time, an employee is not foreclosed, in an appropriate case, from pursuing any remedy at law that might be available for breach of fiduciary duty owing by the union." 198 N.Y.S. 2d at 283-284 (emphasis added).

The New York Court of Appeals thus made it clear that not only does an employee have no standing to challenge an arbitration award in a proceeding such as the one involved in this case, but that the employee's remedy is a separate action under Section 301.

That uncertainty would result if UPS' position is upheld on this appeal is apparent. A Section 301 claim may be brought in either the state court or federal court. The New York State courts have made it clear that an employee has no standing to vacate an arbitartion award, see In Re Soto, supra, and the only New York case which has touched upon the issue of the statute of limitations even in a peripheral manner, Jackson v. Regional Transit Service, 54 A.D.2d 305, 388 N.Y.S. 2d 441 (4th Dept. 1976), made it clear that whatever the statute of limitations was in

a Section 301 claim it was not the ninety-day period provided by New York CPLR 7511(a), for if that were the limitations period the plaintiff's claim would have had to be dismissed as untimely, the court in Jackson stating:

> "The union then demanded arbitration and the merits of the alleged wrongful discharge were presented to the arbitrator. On December 3, 1975 the arbitrator issued a decision in which he held that the failure of the union to name its arbitrator within the contractual time limits (5 days) renders the grievance non-arbitrable. No proceeding was instituted within the ninety-day time limit to modify or vacate the award (CPLR 7511)." 388 N.Y.S.2d at 442

Accordingly, if in the federal courts the ninety-day statute of limitations was deemed to be applicable and in the state courts the three or six-year statute of limitations was deemed to be applicable, the result would be rampant forum shopping

and a clear disregard of this Court's mandate in International Union, UAW v. Hoosier Cardinal Corp., supra, that the appropriate statute of limitations is the relevant statute of limitations of the state in which the court sits. One must believe that the statute of limitations selected by the courts of New York is the most relevant one, and not the ninety-day statute of limitations which the petitioner is seeking to engraft upon Section 301.

The Court below properly pointed out that a Section 301 claim is a separate action, separate and apart from any arbitral decision that may have occurred during the grievance proceeding.

We are not here dealing with a situation where either the Union or the employer is attacking the arbitrator's decision. In that situation, the ninety-day limitation period

to vacate an arbitration award would be applicable. What we are dealing with is the employee's claim that he was not properly represented, and with regard to that claim, the statute of limitations applicable to vacating arbitration awards is totally inapposite.

III. Providing a Discharged Employee Who Has Been Sabotaged by His Own Union a Reasonable Period of Time to Commence a Section 301 Claim Would Not Threaten Federal Labor Policy, Discourage Arbitration or Destroy Collective Bargaining as is Prophesized by Petitioner's Counsel.

The Second Circuit in its decision in the Court below pointed out:

> "Rather, actions under § 301 are limited to those rare cases where the discharged employee can demonstrate both that the employer violated the collective bargaining agreement by discharging him and that the union violated its statutory duty by failing to represent him in good faith.

> "This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge. There is no need to increase this burden by requiring the employee to commence the action in an unduly short period of time after his discharge. To require an employee--who is suddenly out of work--to obtain new counsel and file an action against his union and employer all within 90 days of his discharge strikes us as unwarranted." 624 F.2d at 397 (emphasis added)

The Circuit Court's decision is clearly reasonable and commensurate with the practicalities of real life. When an employee has a valid 301 claim it is because the union which was supposed to represent him is suddenly found to have sold him out. To require an employee suddenly out of work to obtain counsel and file a Section 301 claim against his union within ninety days would be totally unreasonable, unrealistic and contrary to this Court's mandate in International Union, UAW v. Hoosier Cardinal

Corp., supra. In that case, this Court held that the appropriate Indiana statute of limitations to a Section 301 claim was six years. This Court also specifically stated:

> "Other questions would be raised if this case presented a state law characterization of a §301 suit that reasonably described the nature of the cause of action, but required application of an unusually short or long limitations period. See, e.g., N.M. Stat. § 59-3-4 (1953) (an action for wages 'must be commenced within sixty (60) days from the date of discharge...')." 383 U.S. at 707.

The Petitioner attempts to distinguish International Union, UAW v. Hoosier Cardinal Corp., supra, on the grounds that the grievance procedure there did not contain an arbitral decision. This argument is a spurious one.

If employers will refuse to enter into collective bargaining agreements because the

six-year statute of limitations is too long then it does not matter if there was an arbitral decision or not. This would be merely a distinction without a difference. The spectre that a 301 claim would destroy the collective bargaining process was raised before this Court in Hines v. Anchor Motor Freight, Inc., supra, and disposed of by this Court with the statement that unless employees had a manner of redressing their grievance when they were improperly represented by the union:

> "The contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract." 424 U.S. at 571

The petitioner's position also ignores the basic proposition that unions exist to protect the membership and not that the membership exists to support the union.

If employees are given no means of reasonable redress when their union fails to properly represent them, then the entire union-management system which now exists would collapse. It should also be recalled, as this Court pointed out in Hines, supra, that a 301 action does not exist unless the union has breached its duty to the employee so that if the union does not breach its duty there will be no question of any labor policy being endangered.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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No. 80-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

vs.

WILLIAM MITCHELL,

Respondent.

BRIEF ON BEHALF OF RESPONDENT LOCAL 177, I.B.T. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of Issues Presented for Review

Is the action for unfair representation in this cause actually an action to vacate the arbitration award?

Should there be a different statute of limitations applied in this cause as against the employer and the Union?

Should public policy in favor of speedy, final and binding decisions of labor-management grievances require the application of the statute of limitations applicable to vacation of arbitration in order to prevent labor-management chaos?

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Statement of the Case

Respondent Mitchell had been an employee of Petitioner United Parcel Service, Inc. (hereinafter known as "UPS") at the location of UPS in Staten Island, New York. He was discharged on January 13, 1977 by UPS upon the claim by UPS that he falsified his time cards and arranged thereby for pay for hours that he did not actually work.

He was a member of Local 177, Department Store and Wholesale Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter known as "Local 177" or the "Union") which is a party to a collective bargaining agreement with UPS which collective bargaining agreement encompasses the employment of Mitchell. The Union opposed the discharge and proceeded under the grievance procedure of the collective bargaining agreement referred to above to the Joint Atlantic Area Parcel Grievance Committee (hereinafter known as the "Panel"). This panel is part of the grievance procedure described in the collective bargaining agreement.

The panel issued an award on February 16, 1977 upholding the discharge of Mitchell by UPS. According to the collective bargaining agreement, this decision is final and binding.

Approximately one and a half years later, this suit was instituted by Mitchell under Section 301(a) of the Labor Management Relations Act of 1947. The complaint herein alleges that UPS's discharge violated the collective bargaining agreement and that the Union had failed to represent him fairly in certain ways, including not paying Mr. Mitchell's way to the panel arbitration which was held in Virginia, and holding the arbitration in Virginia and in not providing effective arguments and witnesses.

The Joint Atlantic Area Parcel Grievance Committee panel is a procedure established under a master collective bargaining agreement covering many Locals and UPS for most of the eastern coast states, including approximately 89 Locals from New England to South Carolina, inclusive. The panel may hear cases from many or all of those states and sets its meeting dates and places without securing the approval of any individual Local or division of UPS.

Local 177 as a practice has never paid for any grievant's travel costs to the location of the panel hearings. The panel acts according to its rules by joint action of representatives of management and labor, the labor side of the panel being chosen from among the various east coast Locals mentioned above.

The defendants moved for Summary Judgment in the District Court case alleging that the action was barred by New York Civil Practice and Rules §7511(a) which provides for a 90 day statute of limitations for any action to vacate an arbitration award. The case was not started timely under the 90 day statute of limitations provided therefor. Plaintiff Mitchell argued that a six year statute of limitations should apply under New York law because the action was one in contract with the Union violating a contract of membership by failing to represent properly.

The District Court granted Summary Judgment on the Defendants' motion dismissing the complaint, further stating that the action was one to vacate an arbitration award. The reasoning therein was that since the arbitration award did exist, the action must be one to vacate an arbitration award because its very existence allowed the discharge of Mitchell to stand. Mitchell appealed to the Court of Appeals which overuled the District Court, citing *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976) for the proposition that the fair representation aspects of the case brought it under the six year contract statute of limitations, reversing entirely the District Court's dismissal.

The Petition for Writ of Certiorari was granted.

ARGUMENT

POINT I

The 90 day statute of limitations should be applicable to this suit as to the claims against both the employer and the union.

Plaintiff in this cause has commenced action against the union for unfair representation and the company for improper discharge. No matter what course or combination thereof plaintiff chooses to follow is eventually confronted with the fact that an arbitration award sustaining his discharge exists. He has no job with UPS unless and until the arbitration award is disposed of by vacation, modification or rehearing. The New York statute involved, N.Y. Civ. Prac. Laws and Rules §7511, *et seq.*, provides that arbitrations may be vacated, modified or confirmed. In the event of vacation, the arbitration may be retried before the same arbitrator or another arbitrator.

Plaintiff has not explored in the pleadings in this case the possibility of vacation or rehearing the arbitration. However, that, of course, is always an outstanding possibility. Given the existence of the arbitral decision, that decision must be disposed of some how either by sustaining it or vacating it to have any benefit to the plaintiff. *Hines* v. *Anchor Motor Freight, Inc., supra,* recognizes the distinction between the two claims, namely that against the employer and that against the union for unfair representation. It further holds that the arbitration itself may be void if there were substantially unfair representation of plaintiff by his union. Should this be found, it would result in a vacation (and possibly a rehearing) of the award.

The questions which arise from this status concern what shall be the statute of limitations applicable to plaintiff's claim? Also, the question arises: should there be a different statute of limitations, one as to the union and another as to the company?

The case against the union and the case against the company both arise out of contract. The case against the union relies upon a contract of membership. The case against the company arises out of the contract of employment.

Most states and the federal jurisdiction apply a 90 day statute of limitations to actions to vacate an arbitration award. This is true even though the employee's rights, vis-a-vis, his employer are contractual. There is nothing new or shocking about limiting this contractual action (vacation of an arbitral award) to 90 days.

However, the Second Circuit Court of Appeals decided that it is unfair to apply it as against the union. The union in this case urges upon this Court that the 90 day statute of limitations is no more shocking as regards the claim against the union for unfair representation than it is against both the union and the employer where the arbitration is the final step of the contractual procedure concerning the employee's job rights.

The United States Court of Appeals for the Second Circuit in its decision in this case lists its reasons for applying a longer statute of limitations to plaintiff's claim in this case. On page 1531 of the decision below (A11) the court states: "This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge . . ." The Union urges that the burden is no different at all than that required to overturn an arbitration award against the company and the union.

Precisely the same facts must be marshalled and presented in either case. Where then is the logic in saying that when suing to vacate the arbitration award against both the company and union in effect, 90 days is sufficient but that when suing the union alone 6 years is proper?

It is the belief of the union in this case that the Court below has misread *Hines* by overextending its logic. As stated previously, *Hines* defines the two separate rights as against the union and as against the company and the arbitration award. *Hines* does not decide the question of the applicable statute of limitations.

UPS has in its Supplemental Brief In Support of Petition for a Writ of Certiorari cited the recent case of *Liotta* v. *National Forge Co.*, decided by the Third Circuit Court of Appeals on September 10, 1980. It is the belief and the position of the union herein that the reasoning in that case applies to the statute of limitations in this case. That case holds that an action similar to the one here involved is a case to vacate an arbitration award even though it involves alleged union breach of duty of fair representation. This case cites *Barbarino* v. *Anchor Motor Freight, Inc.* and others to the same effect. Nothing in that decision disagrees with the concepts of *Hines*.

It is important herein to point out additional factors of prime importance: why the 90 day statute of limitations should apply and should apply to both company and union.

The practicalities of the situation almost dictate what course the union believes this Court should follow. If the union arbitrates a discharge of an employee or a variety of other grievances, the only reason for arbi-

trating would be to solve an outstanding dispute. It can be imagined that frequently the resolution of the dispute is more important to the parties than the individual decision. This is clearly the import of all of the cases in the field. Many of the cases contain phrases which indicate an expectation that arbitration is not perfect and that speedy solution to disputes is to be desired to maintain industrial peace.

If a union is faced with a 6 year statute of limitations, the officers of that union may be out of office, the witnesses may be retired, transferred or otherwise unavailable on both sides. The union can never feel that a decision of an arbitrator is final and binding knowing that 6 years in the future it may be held for damages or to reopen a discharge case based upon an allegation of a breach of the duty of fair representation. Knowing this to be true, what motive would there be for a union to arbitrate at all? It would be faced with the effort of an arbitration and the effort to settle a dispute with full knowledge none of these matters can be laid to rest with confidence for 6 more years. In six years questions of other employees' seniority, retirement, job choice, welfare claims and a myriad of others would have to be restructured, if possible, to meet a possibly adverse finding 6 years after arbitration. Obviously, these questions present an impossibility for a union. If an employee six years later is determined to have been the victim of unfair representation, he may be awarded his job back or he may be awarded damages against the union alone or the company alone or any combination thereof. How will questions of hospitalization benefits, sickness and promotions be determined when other employees may have filled the plaintiff's job in good faith?

Rather than face this impossible panoply of insolvable problems, unions would quite likely feel that it would be wrong to maintain a grievance procedure at all. Perhaps both union and company would feel that they are facing impossible alternatives no matter which way an arbitration is decided. Would it not be simpler for a union to negotiate out a no strike clause and a grievance clause and allow the forces of economic stress such as work stoppage, lock-out and the like to hold sway and settle upon the conditions resulting from each individual combat? At least the company and the union would not be faced with a suit as much as six years later to determine whether they had properly represented an employee in attempting to follow an open-ended grievance procedure such as plaintiff proposes in this case.

Both union and company, in the event of a lock-out or a work stoppage would be put to the test of their economic strength and win or lose immediately by either conceding that the union had won its point or the company had won its point by one side or the other giving in immediately.

UPS in its briefs supporting Petition for Writ of Certiorari in this case has pointed this same factor out. They point out that only where the company wins an arbitration would they be subject to a subsequent suit by the aggrieved employee. On the union's side, it is here urged that only when the union loses a case or a point therein would the possibility of a distant unfair representation suit arise. However, not knowing the outcome of each case, the union could never predict the future of an unfair representation case years away. The damages and the consequences that could flow from the ultimate decision of such a case are so unknown and could involve large numbers of employees, that the motive to settle a grievance through contractual procedures is totally removed from the labor-management picture.

It is for this reason that the union urges that the very same 90 day statute of limitations that is applied in the *Liotta* case should be applied in this case. It would solve nothing to say that the case against the employer should have a 90 day statute of limitations but the case against the union (also based on contract) should have a 6 year statute of limitations because of the obvious union choice in the future not to rely on arbitration or contractual procedures. Certainly, a union, consulting its legal counsel, could not be told with any certainty that the arbitration settles the issue. Many lawyers would be constrained in the event of a 6 year statute of limitations to tell his client, the union, that sometime in the future a discharged employee or an employee aggrieved in any other way could raise some issue before a jury in a Federal District Court and subject the union to a large damage award and to all of the other consequences described above.

It is the belief of Local 177 that this case is of paramount importance to the structure of labor law in the future. The situation of a long statute of limitations in labor relations such as is sought here by plaintiff is an absolute impossibility to live with. It is impractical and unfair, not only to the employer but to every member of the bargaining unit represented by the union. No one could count upon a decision being effective. All of the daily decisions in the work place would have to be tentative for an insufferably long period of time. This is exactly the type of situation which all of the case law and all of the statutory law strong opposes. It is for these reasons obviously that the federal policy has always been and must continue to be a final and binding decision in an expedited fashion upon which the parties may rely thereafter.

The union feels in this case that the allegations concerning the unfair representation are spurious and frivolous at best. However, even where they may be substantial, the

overriding policy questions are so far reaching in nature as to mitigate against a long statute of limitations in industrial disputes. As has already been pointed out, if the arbitration itself were faulty for some reason other than a failure of duty of fair representation, the 90 day statute of limitations applies. That is the reason behind the majority of states and the federal jurisdiction itself in applying such a 90 day limit. These 90 days limits have been in effect for many, many years and there are many cases where one side or the other proceeds to attempt to vacate, modify or confirm arbitration awards within the 90 day time limit. In this cause Mitchell knew immediately that the union would not pay his way to the situs of the panel hearing. He knew immediately that he would not attend the hearing. He knew immediately what arguments were being presented on his behalf. There is nothing whatsoever in this case to indicate that new facts emerged after 90 days from the date of the arbitration decision. What could possibly be the reason or the logic behind arguing for a longer statute of limitations? The Second Circuit Court of Appeals in this case overemphasized the difficulties of Mitchell in starting a case. There is no explanation of why Mitchell took 17 months to consult an attorney and start this case. The union herein disagrees with the paragraph beginning at the bottom of page 1531 of the Decision below. At the bottom of page 1532, the Court below states that ". . . a §301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. . . ." This is not conceded by the Union in this cause. Both cases must start with a complaint and some form of process. Presumably a lawyer would be involved. The case of *Donato* v. *American Locomotives,* 283 App. Div. 410, Aff'd 306 N.Y. 966 (1954) interpreting the New York statute §7511 holds that an arbitration award may be vacated on the application not only by a party to the collec-

tive bargaining agreement but also a person in the place of a third party beneficiary (such as Mitchell) who neither participated in or was served with notice of the arbitration. The case went on to say that even in those situations the 90 day statute of limitations applies and that the action is one to vacate an arbitration award.

So, plaintiff in this cause availed himself of no facts in addition to those he knew immediately and was in no substantially different position with regard to starting a U.S. District Court case under §301 or an action either in state or federal court to vacate an arbitration award. The union in this cause also subscribes to the arguments made by UPS in its brief below in the Second Circuit Court of Appeals and its arguments in its Petition for Writ of Certiorari and its Supplemental Brief in Support of Petition for Writ of Certiorari in this cause.

CONCLUSION

The 90 day statute of limitations contained in New York State law should be applied to this cause equally to both employer and the Union for reasons of important public policy to promote peaceable and final and binding settlement of disputes in the labor-management field.

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Dated: November 24, 1980

No. 80-169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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No. 80-169

IN THE

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OCTOBER TERM, 1980

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v.

WILLIAM MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

Pursuant to Rules 34.4 and 35.3 of the Rules of the Supreme Court, petitioner, United Parcel Service, Inc. ("UPS"), hereby submits its reply brief on the merits.[1]

1. Pursuant to Supreme Court Rule 28.1, United Parcel Service states that it is a wholly owned subsidiary of United Parcel Service of America, Inc. United Parcel Service of America, Inc., is affiliated with Service Plants Corporation ("SPC), a holding company whose subsidiaries (all wholly-owned) own and lease real estate to UPS. Owners of UPS capital stock own beneficial interests in SPC common stock.

STATEMENT OF THE CASE

The issue presented in this case is which statute of limitations applies when an employee, who unsuccessfully challenged his discharge in arbitration, institutes a subsequent action against his employer under section 301 of the **Labor-Management Relations Act,** 29 U. S. C. § 185. The Court of Appeals for the Second Circuit held that the appropriate statute of limitations is the six-year period contained in **N. Y. Civ. Prac. Law** § 213(2). UPS contends that this action should be governed by the ninety-day statute of limitations applicable to proceedings to vacate arbitration awards, **N. Y. Civ. Prac. Law** § 7511(a), since the relief respondent seeks (reinstatement with back pay) can be obtained only by vacating the arbitration award which had denied his grievance.

ARGUMENT

I. Respondent's Alternative Contention That His Claim Against UPS Might Be Governed by a Three-Year Statute of Limitations Is Plainly Incorrect.

UPS's principal brief focused only on the question whether Mitchell's claims against it should be governed by **N. Y. CPLR** § 7511(a) or by **N. Y. CPLR** § 213(2), since those were the only two statutes of limitations considered by the Court of Appeals. Mitchell, however, contends that this Court need not choose between only those two statutes of limitations. Rather, he suggests that this Court could find the action also governed by three different three-year provisions of a New York statute of limitations —**N. Y. CPLR** §§ 214(2) (statutory claims), 214(5) (personal injury) and 214(6) (malpractice). Since Mitchell filed his suit nineteen months after his discharge, he claims that his action would be timely under any of those three provisions of the statute of limitations.

The three different statute of limitations provisions cited by Mitchell have no relevance to his claim against UPS; they would apply (if at all) only to Mitchell's claim against his *union*, the Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union #177 ("the Union"). However, the only question raised in the petition for certiorari is the statute of limitations applicable to Mitchell's claim against his employer, UPS. *See* **Liotta v. National Forge Co.**, 629 F. 2d 903 (3d Cir. 1980).

That **N. Y. CPLR** §§ 214(2), 214(5) and 214(6) apply, if at all, only to Mitchell's claim against the Union is evident both from Mitchell's brief itself and from the cases on which he relies. Mitchell's discussion of two of those provisions—**CPLR** § 214(2) (statutory claim) and § 214(6) (malpractice)—addresses only his claims against the Union.

See Brief for Respondent at 13-14 and 22. Furthermore, the cases he cites in support of his contention that his suit was subject either to the statute of limitations provision for actions alleging breach of a statutory duty [2] or to the one for personal injury [3] applied such statute of limitations provisions only with respect to claims against unions alleging a breach of the duty of fair representation. The fact that Mitchell may have a claim against the Union does not affect the determination of which statute of limitations governs his claim against his employer. *See* **Liotta v. National Forge Co.,** *supra,* 629 F. 2d at 905.

Finally, none of the provisions of the statute of limitations urged by Mitchell has any particular relevance to a claim filed against an employer after the employer has prevailed in arbitration. Since Mitchell is seeking relief denied him by an arbitration award, the statute of limitations applicable to proceedings to vacate arbitration awards obviously addresses his claim more specifically than do statute of limitations provisions for malpractice, breach of a statutory duty or personal injury.[4]

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2. **Gray v. International Assoc. of Heat & Frost Insulators and Asbestos Workers, Local No. 51,** 416 F. 2d 313 (6th Cir. 1969), and **Canada v. United Parcel Service, Inc.,** 446 F. Supp. 1048 (N. D. Ill. 1978). In **Canada,** the claim against UPS was based only on Title VII of the **1964 Civil Rights Act,** not section 301 of the **Labor-Management Relations Act.** *See* 446 F. Supp. at 1051.

3. **Sanderson v. Ford Motor Co.,** 483 F. 2d 102, 114 (5th Cir. 1973); **De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO,** 425 F. 2d 281, 286-87 (1st Cir.), *cert. denied,* 400 U. S. 877 (1970); **Smart v. Ellis Trucking Co., Inc.,** 580 F. 2d 215 (6th Cir. 1978), *cert. denied,* 440 U. S. 958 (1979).

4. *Cf.* **Morton v. Mancari,** 417 U. S. 535, 550-51 (1974); **Radzanower v. Touche Ross & Co.,** 426 U. S. 148 (1976); **Preiser v. Rodriguez,** 411 U. S. 475, 488-90 (1973); **Lashlee v. Sumner,** 570 F. 2d 107, 109 (6th Cir. 1978), which were discussed on pages 12 and 13 of UPS's principal brief.

Indeed, by advocating the adoption of a three-year statute of limitations which would apply only to his claim against the Union, if at all, Mitchell underscores the illogic of his contention that his claim against UPS is subject to a six-year statute of limitations. Adopting a three-year statute of limitations for the Union, while at the same time adopting a six-year breach of contract statute of limitations for the employer, would lead only to the most anomalous and inequitable of results. Under **Hines v. Anchor Motor Freight, Inc.**, 424 U. S. 554 (1976), an employee who lost at arbitration can prevail against his employer in a section 301 action only if he establishes, *inter alia*, that the union breached its duty of fair representation during the arbitration process. However, if a suit were brought more than three, but less than six, years after the cause of action accrued, only the employer (under Mitchell's view) could be held liable, despite the fact that the union's wrongdoing must be established in order for the employee to recover from his employer. Thus, adopting a longer limitations period for the employer than for the union would be inconsistent with this Court's observation in **Vaca v. Sipes**, 386 U. S. 171, 187 (1967), that: "What possible sense could there be in a rule which would permit a court that has litigated the fault of the employer and the union to fashion a remedy only with respect to the employer?" It is anomalous to suggest that a longer statute of limitations should apply to an employer than to the union whose dereliction is the prerequisite to employer liability.

Finally, even if it were assumed *arguendo* that Mitchell is correct in analogizing his claim against the Union to a claim for malpractice, this would confirm UPS's position that the claim against it should be subject to a ninety-day limitations period. When a litigant has a valid malpractice claim against his counsel for failing to

file suit against the intended defendant within the limitations period, that litigant's claim against the intended defendant nevertheless remains time-barred. Similarly, a litigant may have a viable malpractice claim against his counsel for improper handling of a case which has been tried and lost on the merits, and yet be barred by *res judicata* from proceeding a second time against the original defendant. Thus, if the Union's alleged failure to represent Mitchell fairly were in fact analogous to malpractice, as Mitchell suggests, there would be nothing at all unusual in allowing him to proceed against the Union only and not against UPS. Mitchell, however, suggests an absurd scenario in which employees frequently would be able to proceed against the employer only, and not against the union, although the union is the party guilty of the "malpractice." Such a result would be both illogical and contrary to **Vaca v. Sipes.**

II. Respondent's Reliance on Jackson v. Regional Transit Service Is Misplaced.

On pages 31-32 of this brief, Mitchell construes the New York state court decision of **Jackson v. Regional Transit Service,** 54 A. D. 2d 305, 388 N. Y. S. 2d 441 (4th Dept. 1976), as implicitly rejecting the applicability of **N. Y. CPLR** § 7511(a) to proceedings brought pursuant to **Hines v. Anchor Motor Freight,** *supra.* As Mitchell notes, the action in **Jackson** had been filed after expiration of the 90-day time limit set forth in **CPLR** § 7511(a). However, the opinion in **Jackson** gives no indication whether the employer had moved to dismiss the case on the ground that it was time-barred under **CPLR** § 7511(a), nor does it even address the question of which statute of limitations was applicable. Moreover, the very language quoted on page 32 of Mitchell's brief makes clear that the arbitrator in **Jackson** had merely concluded that the grievance was

"non-arbitrable" because of noncompliance with the contractual time limits for selecting an arbitrator. An arbitrator who refuses to hear the case at all obviously has not decided the issue on the merits or indeed made any award. Accordingly, the plaintiff in **Jackson,** unlike Mitchell, was not seeking to vacate an arbitration award or to relitigate the same issue decided against him in arbitration. Consequently, **Jackson** is of no support at all for Mitchell's position in this litigation.

Indeed, **Jackson** actually undercuts Mitchell's position by casting doubt on the continued validity of one of the principal cases upon which he relies, **In re Soto,** 7 N. Y. 2d 397, 165 N. E. 2d 855 (1960). Mitchell relies on **In re Soto** for the proposition that he would not have had standing in the New York state courts to move to vacate an arbitration award.[5] **Jackson,** however, noted that **In re Soto** had been decided *prior* to **Vaca v. Sipes.** Citing **In re Soto,** the court in **Jackson** stated:

> Under New York law prior to *Vaca v. Sipes, supra,* a private union employee had no direct action against his employer; but was limited to the remedies provided by the collective bargaining agreement negotiated between his employer and his union. . . . [citations omitted]. However, the United States Supreme Court has extended the rights of an individual employee and ruled that a wrongfully discharged employee may bring an action against his employer. . . . Even where the grievance proceeds to arbitration on

5. As pointed out on pages 13-14 of USP's principal brief, whether or not Mitchell would have had standing in the New York state courts is completely irrelevant to the question of which *statute of limitations* applies when he files a section 301 suit in federal court. As a matter of federal law, Mitchell clearly has standing. *See* **Vaca v. Sipes,** 386 U. S. 171 (1967); **Smith v. Evening News Ass'n,** 371 U. S. 195 (1962).

> the merits, if the union breached its duty of fair representation, the arbitration award will not bar a direct suit by an employee against his employer [citing *Hines*].

388 N. Y. S. 2d at 443. **Jackson** then proceeded to permit a direct suit by an employee against his employer, a result which it stated would not have been permissible under **In re Soto.**

III. The Only Statute of Limitations Appropriate for Mitchell's Claim Against UPS is the 90-Day Statute for Actions to Vacate Arbitration Awards.

Mitchell's brief fails to offer any convincing rebuttal to UPS's contention that his claim against UPS is subject to the 90-day statute of limitations contained in **N. Y. CPLR** § 7511(a). Mitchell's argument in essence is that the statute of limitations should be the same (six years) whether or not there is an arbitration award because in either event his underlying claim is the same—wrongful discharge in violation of the collective bargaining agreement. However, for at least three reasons, the fact that Mitchell's underlying claim is for wrongful discharge does not negate the applicability of the 90-day statute of limitations for actions to vacate arbitration awards.

First, under **Hines,** Mitchell cannot even litigate his underlying wrongful discharge claim unless he first convinces the Court to remove "the bar of the finality provisions of the contract" by proving that the Union breached its duty of fair representation. **Hines,** *supra,* 424 U. S. at at 567. In the instant case the finality is embodied in an arbitration award, and Mitchell therefore must persuade the Court to vacate that award before reaching the merits. However, because Mitchell did not file a timely action to vacate the award, the award remains valid and proves an

insurmountable hurdle to the relitigation of his underlying claim of wrongful discharge.

Second, Mitchell's assertion that the applicable statute of limitations depends on the nature of the underlying claim rather than on whether there was an arbitration is misplaced. Every arbitration award involved an underlying claim. The very nature of arbitration is that an underlying claim has been submitted to an arbitrator for resolution. Pushed to its logical extreme, focusing on the nature of the underlying claim would preclude a party from being able to assert **CPLR** § 7511(a) as a bar to *any* proceeding to overturn an arbitration award—including proceedings brought by unions and employers, which Mitchell concedes (Brief for Respondent at 33-34) are governed by **CPLR** § 7511(a).

Third, the inescapable effect of granting Mitchell the relief he seeks in this lawsuit is nullification of the arbitration award. Even the two courts—the court below and the Sixth Circuit—that have adopted the view he advocates have admitted as much. As the court below stated (A. 139), quoting **Smart v. Ellis Trucking Co.**, 580 F. 2d 215, 219 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979), "'the effect of a judgment for [the discharged employee] would be to nullify the arbitral decision, . . .'" Since Mitchell seeks to have the award set aside in order to litigate his underlying claim, and since the necessary result of a successful lawsuit would be the setting aside of the award, it is evident that the state statute of limitations for proceedings to vacate arbitration awards fits his action more closely than does any other statute.

Mitchell also has failed to rebut UPS's contention that a six-year statute of limitations would undermine federal labor policy. This Court has stressed repeatedly that, when applying state statutes of limitations to federal claims, care must be taken not to undermine the federal policies involved. **Occidental Life Insurance Co. v. EEOC,**

432 U. S. 355, 367 (1977); **Johnson v. Railway Express Agency, Inc.**, 421 U. S. 454, 465 (1975); and **International Union, UAW v. Hoosier Cardinal Corp.**, 383 U. S. 696, 706-07 (1966). The federal policy favoring arbitration as a speedy and inexpensive means of resolving labor disputes clearly would be frustrated if, despite taking a dispute to "final and binding" arbitration, the parties could be forced to relitigate the same dispute in the courts six years later. For six years after the dispute arose, management and labor could rely on an arbitration award only at their peril. Where the arbitrated dispute involves a question of contract interpretation or a class of grievants, the uncertainty created by the possibility of litigation six years later as to contracts of one to three years' duration would be intolerable. Management and labor cannot have a smooth collective bargaining relationship where the myriad of disputes that arise between them cannot be resolved quickly and finally.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in petitioner's principal brief, petitioner, United Parcel Service, Inc., respectfully requests this Court to reverse the judgment of the Court of Appeals and to direct the reinstatement of the judgment of the District Court that had dismissed the complaint with prejudice.

Respectfully submitted,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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In The

Supreme Court of the United States

October Term, 1980

No. 80-169

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

WILLIAM MITCHELL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioner in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States. This case concerns the applicable limitations period for challenging determinations under grievance arbitration systems established through collective bargaining. Decision

of the question presented will affect the functioning of that system which is central to the administration of the majority of collective agreements. It is for that reason that the AFL-CIO seeks this opportunity to present its views to the Court.

ISSUE TO BE COVERED IN THE BRIEF AMICUS CURIAE

The Court of Appeals considered itself to be bound by *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, to determine the applicable limitations period in this case "as a matter of federal law, by reference to the appropriate state statute of limitations" (*id.* at 704-705, quoted at A. 135). We submit that the court below was not so bound by *Hoosier*, and that the lower court erred in applying a state statute of limitations, rather than the limitations period specified in the National Labor Relations Act, which is directly involved in this case. The attached brief *amicus curiae* is devoted to demonstrating that proposition.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals considered itself to be bound by *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, to determine the applicable limitations period in this case "as a matter of federal law, by reference to the appropriate state statute of limitations" (*id.* at 704-705, quoted at A. 135). We submit that the court below was not so bound by *Hoosier*, and that the lower court erred in applying a state statute of limitations, rather than the limitations period specified in the

National Labor Relations Act (NRLA), which is directly involved in this case.[1]

A.

Hoosier involved a straightforward breach-of-contract damage suit brought by a union against an employer under § 301 of the Labor Management Relations Act (LMRA). In the context of that action, which "closely resemble[d] an action for breach of contract," and which did not implicate "those consensual processes that federal labor law is chiefly designed to promote—the formation of the agreement and the *private settlement of disputes under it*" (*Hoosier*, 383 U.S. at 702; emphasis added), the Court, in the absence of

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[1] For the reasons stated by the district court herein (A. 128-130) and urged in the petitions for certiorari in the instant case, and in *United Steelworkers of America* v. *Flowers*, No. 80-26 (presently pending), we submit that the more closely analogous state statute would be the New York arbitration law, CPLR § 7511(a), which provides a three-month limitations period. The policy of finality of arbitration awards which is furthered by that provision applies to plaintiff's claims against the employer and the union. Presumably, this issue of proper characterization will be argued fully in petitioner United Parcel's brief and we therefore do not address it.

We do urge however that if the Court decides the case on that ground, and thereby pretermits the broader issues which are discussed in this brief *amicus curiae*, that the Court do so without foreclosing consideration of these issues in some future case in which they may be decisive. Mr. Justice Jackson once observed with his usual felicity of expression that "sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge." *First Nat. Bank* v. *United Airlines*, 342 U.S. 396, 398 (concurring opinion). To borrow his metaphor, we urge that nothing be said in this case which will block for future travelers the "path that we are beating out" by the analysis in this brief.

an express limitations provision applicable to § 301 suits, applied a state statute of limitations.

The instant case, on the other hand, is a hybrid "§ 301 and breach of duty suit[]" (*Vaca* v. *Sipes*, 386 U.S. 171, 197 n.18) brought by an employee against an employer and a union to set aside a "final and binding" determination of a grievance arrived at through the collectively bargained method of settling such disputes. The plaintiff's two claims have entirely different statutory sources and jurisdictional bases—the duty of fair representation being implied from the NLRA. At the same time, in a suit such as that here the plaintiff's claims are inextricably interdependent.

B.

The collective agreement in *Hoosier* contemplated court enforcement. The agreement in this case, on the other hand, embodies the policy of § 203(d) of the LMRA—that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes * * *." And, as this Court stated in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, "Arbitration of labor disputes under collective bargaining is part and parcel of the collective bargaining process itself." Where the contract provides for final and binding settlement of grievances, that provision is respected by the courts: the contract remedies are exclusive with the single exception that a "union's breach [of its representation duty] * * * removes the bar of the finality provision of the contract." *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 567. These rules all have their genesis in the NLRA. In particular, the duty of fair representation—which is the

predicate of the plaintiff's action in this case—is derived from the NLRA, not from § 301.

C.

Thus, at the threshold, the nature of this lawsuit is shaped by NLRA principles designed to serve the goals of a functioning collective bargaining system and bears no resemblance to a common law contract damage action designed to determine responsibility for, and to allocate the losses attendant on, a breach. That being so, two considerations mandate the use of the NLRA limitations period set fourth in § 10(b).

First, Congress crafted § 10(b) precisely to protect ongoing collective bargaining systems from delayed attack. As this Court put it in *Machinists Local* v. *Labor Board*, 362 U.S. 411, 425, underlying the six-month bar of § 10(b) is a Congressional purpose to foster "stability of bargaining relationships." Moreover, the Act favors "final" settlement of contract disputes as the preferred means to the end of stabilizing bargaining relationships and securing industrial peace. If such settlement could be challenged long after the fact, these purposes of a system of private "final adjustment" of grievances would be undermined.

Second, the point just made becomes conclusive when it is remembered that the employee's duty of fair representation claim is implied from the NLRA, and court jurisdiction over that claim is provided by 28 U.S.C. § 1337 not by § 301. More precisely, some or all breaches of that duty constitute unfair labor practices under §§ 8(b)(1)(A) & (b)(2) of the NLRA. To the extent breach of the representation duty is an unfair labor practice, the limitations pe-

riod of § 10(b) is directly applicable. And whether the representation duty is stated as an unfair labor practice or whether it is related to §§8(b)(1) & (b)(2) in its general purpose and effect, § 10(b) is the proper source for determining when claims of breach of duty must be raised. For that limitations period reflects Congress' judgment as to when claims of like or identical character must be brought.

D.

That Congress has failed to provide an express limitations period for a judicially enforceable cause of action this Court has found implied in the NLRA should not be equated with a Congressional failure to state a limitations period for an action expressly created by statute. It cannot reasonably be assumed in this regard, as it was in *Hoosier*, that Congress' silence reflects an intent to apply state statutes of limitations to NLRA-based actions.

One aspect of the instant case is predicated on §301 of the LMRA: if the plaintiff can establish his NLRA breach of the duty of fair representation claim, he may then pursue his § 301 breach of contract claim. But here, unlike *Hoosier*, the latter is a direct challenge to the result reached in the contractual grievance resolutions system. The policy of promoting stability in collective bargaining which underlies the six-month limitations period in the NLRA is directly implicated by this aspect of plaintiff's case as well.

And the contractual aspect of this proceeding cannot, in any event, be disentangled from the breach of duty aspect for purposes of determining the limitations period, because breach of the union's duty is a necessary predicate to pursuit of the contract claim. When the six-month period has

passed with respect to the alleged union breach of its duty, that conduct becomes beyond challenge, and the precondition for maintaining the contract action cannot be met.

Finally, under the applicable rule most recently stated in *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367, even were it appropriate to view the suit here as simply founded on § 301, the proper course would be to apply § 10(b), which expresses the relevant national policies, rather than a state statute of limitations.

ARGUMENT

1. *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, was a straightforward breach-of-contract damage suit brought by a union against an employer under § 301 of the Labor Management Relations Act (LMRA). "Congress did not provide a uniform limitations provision for § 301 suits" (*id.* at 703), and the Court concluded that in the case before it a state statute of limitations should apply.

The *Hoosier* Court recognized that

> The need for uniformity [in § 301 cases] * * * is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. [*Id.* at 702.]

In the Court's view that consideration did not justify judicial creation of a uniform limitations period applicable to § 301 suits generally:

> For the most part, statutes of limitations come into play only when [the] processes [mandated by federal labor law] have already broken down. Lack of uni-

> formity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. [*Id.*]

The Court, however, added this caution:

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question. [*Id.* at 705 n. 7.]

The instant case is a hybrid "§ 301 and breach of duty suit[]" (*Vaca* v. *Sipes*, 386 U.S. 171, 197 n. 18), brought by an employee against an employer and a union to set aside a "final and binding" determination of a grievance arrived at through the collectively bargained method of settling such disputes. As this Court has recognized, the plaintiff's two claims have entirely different statutory sources and jurisdictional bases—the duty of fair representation being derived not from § 301 but from the National Labor Relations Act (NLRA). Yet, in a suit such as that here the plaintiff's claims are inextricably interdependent:

> To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. [*Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 570-571.]

We show now that in contrast to a *Hoosier* claim, such suits do not resemble classic common law actions but are

the unique product of an interplay between § 301 of the LMRA—which as the *Hoosier* Court noted has no limitations provision—*and* the NLRA as amended. The latter, of course, does contain a limitations provision, § 10(b), for initiating unfair labor practice claims which Congress fashioned to safeguard the stability of functioning collective agreements. For the reasons we develop § 10(b) should be held to provide the limitations period governing suits like the present.

2. The collective agreement in *Hoosier* contemplated court enforcement. The agreement in this case, on the other hand, embodies the policy of § 203(d) of the LMRA—that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes * * *." See *Truck Drivers Union* v. *Riss & Co.*, 372 U.S. 517. Compare *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 426 (where the Court deemed it "important to note" the same distinction in a different context).

In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578, the Court distinguishes commercial arbitration, which reflects a breakdown of the contractual relationship, from "arbitration of labor disputes under collective bargaining [which] is part and parcel of the collective bargaining process itself":

> Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. * * * The processing machinery is

> actually a vehicle by which meaning and content are given to the collective bargaining agreement. * * * The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement. [*Id.* at 581]

In conformity both with the policy stated in § 203(d) and with the intent of the parties, where the contract provides for final and binding settlement of grievances, that provision is respected by the courts:

> A * * * rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. * * * [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 103. [*Republic Steel* v. *Maddox*, 379 U.S. 650, 653.]

The "general federal rule" (*id.* at 652) of exclusivity of contract remedies announced in *Maddox* admits of only one exception:

> The union's breach of [its representation] duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract. [*Hines*, 424 U.S. at 567.]

And the *Hines* Court noted that while § 301 "contemplates

suits by * * * individual employees, * * * and contrary to earlier indications § 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as * * * wrongful discharge" (*id.* at 562), if the contract provides for arbitration the exception just stated must be satisfied to bring the employee's right to sue into play.

3. The rules of the *Warrior & Gulf, Maddox* and *Hines* cases all have their genesis in the NLRA.

Section 203(d) of the LMRA states in express terms the basic point of the collective bargaining system established by §§ 7, 8(5) & 9(a) of the original Wagner Act, as explained by Chief Justice Hughes in *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 237:

> The [Wagner] Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. * * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce.

And in 1947, Congress in adding § 8(d) to the statute elaborated the duty to bargain as an obligation that continues beyond the process of negotiating a contract to the process of resolving questions arising under the agreement. As the Court stated in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436:

> [T]he duty to bargain unquestionably extends beyond

> the period of contract negotiations and applies to labor-management relations during the term of an agreement. *NLRB* v. *C & C Plywood Corp., ante,* p. 421; *Labor Board* v. *F. W. Woolworth Co.,* 352 U.S. 938. • • • Section 8(a)(5) proscribes failure to bargain collectively in only the most general terms, but § 8(d) amplifies it by defining "to bargain collectively" as including "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . any question arising [under an agreement]. . . .

The *Maddox* rule in turn implicates another basic NLRA principle—that of "majority" rule which is codified in § 9(a). Insofar as employee rights are based on a collective agreement, those rights are, as has been understood from the beginning, subordinated to those of the majority. As this Court reaffirmed in *Emporium Capwell Co.* v. *Community Org.,* 420 U.S. 50, 62:

> Central to the policy of fostering collective bargaining where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937). • • • In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. • • • As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953).

In a footnote to this passage the Court observed:

> In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: "Without them the phrase 'collective bargain-

> ing' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves.'' 79 Cong. Rec. 2372 (1935). [420 U.S. at 62, n. 13.]

One consequence is that the collective agreement extinguishes whatever rights the employee may have had under an individual contract with his employer. This result is logically inherent in the very concept of collective bargaining. The subject was most fully addressed in *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 337-339:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. * * * Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility. * * * The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.

Finally, this Court has found the limitation on the majority rule principle that plaintiff invokes in this case—the duty of fair representation—to be ''implicit in the National Labor Relations Act.'' *Electrical Workers* v. *Foust,* 442 U.S. 42, 46-47 n. 8. That duty is, of course, not stated expressly in the NLRA. Nor is the representation duty expressed in the Railway Labor Act (RLA), from which

statute the duty was first implied by the Court in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192. Citing (*id.* at 199-200), that Act's provisions according employees "the right to organize and bargain collectively through representatives of their own choosing" (§ 2, Fourth), vesting in the "majority of any craft or class of employees * * * the right to determine who shall be the representatives of the craft or class for the purposes of this Act" (*id.*), and "requiring carriers to bargain with the representative so chosen" (323 U.S. at 200, characterizing § 2, Second), the Court reasoned:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. [323 U.S. at 202.]

Because the RLA contained no administrative means to redress violations of this duty, the Court implied a judicial cause of action for its enforcement:

> In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent an act for the members of a craft, is of judicial cognizance * * *. [T]here is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. [*Id.* at 207.]

In a companion case, the Court held that the federal district courts have jurisdiction to entertain such federal causes of action under Judicial Code § 24(8)—now 28 U.S.C. § 1337—as cases "arising under a law regulating commerce." *Tunstall* v. *Brotherhood*, 323 U.S. 210, 213.

The provisions of the RLA from which the Court in

Steele drew the representation duty find their analogy in § 7 (providing employees "the right to self organization * * * [and] to bargain collectively through representatives of their own choosing"), § 9(a) (specifying that "[r]epresentatives designated or selected * * * by the majority of the employees in a unit * * * shall be exclusive representatives of all the employees for the purposes of collective bargaining"), and § 8(5) (requiring employers to bargain with the representatives so chosen) of the original Wagner Act.

In contrast to the RLA, however, the NLRA has from the first contained an express prohibition on *employer* discrimination based on union membership or non-membership (§ 8(3)) and an administrative procedure to implement that prohibition (§ 10). Thus, in *Wallace Corp.* v. *Labor Board,* 323 U.S. 248, which was decided the same day as *Steele* and *Tunstall,* and which like the RLA cases, concerned a collective agreement benefiting union members and harming nonmembers, the Court concluded:

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as a bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. * * * We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the act to protect for all workers. It was as much a deprivation of the rights of

> these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone. [*Id.* at 255-256.]

On this basis the Court in *Wallace* affirmed the Board's decision and order concluding that the employer's enforcement of the discriminatory agreement violated § 8(3).

Then, the 1947 Congress, in enacting the Taft-Hartley amendments, made it unlawful for unions "to restrain or coerce employees in the exercise of the rights guaranteed in section 7" (§ 8(b)(1)(A)), or "to cause or attempt to cause an employer to discriminate against an employee" based upon union membership (or based upon an effort to encourage or discourage union membership) (§ 8(b)(2)). This Court has explained the point of the latter of these amendments to be:

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus [§]8(b)(2) [was] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. • • • This section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed. [*Radio Officers* v. *Labor Board,* 347 U.S. 17, 40, 42-43.]

And, Senator Taft stated the sponsors' rationale for the restrictions placed on exclusive bargaining representatives:

> The committee • • • felt that if it permitted a union

> shop agreement which provided that every man must be a member of the union, then the union must be reasonable, must accept as members all who apply for membership, and must accept them on the same terms as it applies to other members, and must permit them to remain in the union if they are willing to pay their dues. • • •
>
> One of the cases before the committee that I remember was a case in which a man happened to see a foreman knocked down by a union shop steward. He was called as a witness in the case in court, and he testified that the steward was the aggressor and had knocked down the foreman. The shop steward was convicted. The union immediately proceeded to fire that man from the union, and that compelled the employer to fire him from his job. Because he responded to a subpoena and told the truth, that man was fired, and perhaps in that community he could no longer work at the trade in which he was particularly skilled and trained. That is only an example.
>
> • • •
>
> Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so; but, representatives of the union cannot go to the employer and say "You have got to fire this man because he is not a member of our union." [Legislative History of the Labor Management Relation Act of 1947 (G.P.O., 1948) 1096.]

Sections 8(b)(1)(A) & (b)(2) cover the central area of the duty of fair representation delineated by the *Steele* Court—discrimination by the exclusive representative on the basis of union membership. But, given that this Court had not prior to 1947 stated whether the *Steele* duty of fair representation applied to NLRA unions, and that the Taft-

Hartley amendments and their legislative history do not advert to, much less settle, that point, the following questions remained open: Whether the NLRA goes beyond the core area just noted and interdicts all forms of invidious conduct by exclusive representatives; and, whether the administrative procedures for enforcing unfair labor practices are the exclusive means of redress against such conduct by bargaining representatives.

In a series of decisions beginning with *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, the Court concluded that the duty of fair representation applies equally to NLRA and RLA unions. The relevant law is restated in *Hines*, 424 U.S. at 563-564:

> Necessarily "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . . ." ** *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 1953). The union's broad authority in negotiating and administering effective agreements is "undoubted," *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964), but it is not without limits. Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation." *Humphrey* v. *Moore*, *supra*. at 342. The union as the statutory representative of the employees is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman*, *supra*, at 338.

In this connection, the Court has not, however, decided whether §§ 8(b)(1)(A) & (b)(2) fully encompass that duty or apply only to a more limited area of union abuse of authority as exclusive bargaining representative. *Vaca* 386 U.S. at 186.[2]

The Court has further determined that the duty of fair representation under the NLRA may be judicially enforced. *Vaca,* 386 U.S. at 176-188; *Syres* v. *Oil Workers,* 350 U.S. 892 (by reference to *Tunstall,* holding that jurisdiction over

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[2] In *Miranda Fuel Co.,* 140 NLRB 181, the NLRB ruled that violations of the duty of fair representation not made unfair labor practices under § 8(b)(2) are unfair labor practices under § 8(b)(1(A). This Court in *Vaca* found it unnecessary to decide whether *Miranda Fuel* was correctly decided, but simply "assume[d] for present purposes" (386 U.S. at 186) that the NLRB was correct in so ruling.

The Courts of Appeals are divided on this question. The Second Circuit, in *Miranda Fuel* itself, denied enforcement of the NLRB's order. 326 F.2d 172. See particularly *id.* at 175-178 which discusses the conceptual difficulties in the Board's approach. See also *NLRB* v. *Local 294, International Bro. of Teamsters, Etc.,* 317 F.2d 746,748-751 (2d Cir.). But see *NLRB* v. *Local 485, Int. U. of Electrical Wkrs.,* 454 F.2d 17, 21 n. 6 (2d Cir.). The majority of the Courts of Appeals have, on the other hand, upheld the NLRB's view that breach of the duty of fair representation is an unfair labor practice. See *Truck Drivers* v. *NLRB,* 379 F.2d 137 (D.C. Cir.); *Newport News Shipbuilding Co.* v. *NLRB,* —— F.2d ——, 104 LRRM 2633, 2637-38 (4th Cir.); *Abilene Sheet Metal, Inc.* v. *NLRB,* 619 F.2d 332, 347 (5th Cir.); *Kesner* v. *NLRB,* 532 F.2d 1169, 1173-74 (7th Cir.); *NLRB* v. *American Postal Workers Union,* FVR F.2d 1249, 1254-55 (8th Cir.); *Kling* v. *NLRB,* 503 F.2d 1044 (9th Cir.); *cf. Denver Stereotypers* v. *NLRB,* 623 F.2d 134, 136 (10th Cir.).

Here, as in *Vaca,* it is not necessary to resolve this dispute; we therefore do not address the correctness of these competing views.

an NLRA duty of fair representation claim exists under 28 U.S. § 1337).[3]

4. The foregoing makes it manifest that the instant case is not, as was *Hoosier,* one in which the "consensual processes that federal labor law is chiefly designed to promote —the formation of the collective bargaining agreement and the private settlement of disputes under it" have "broken down." 383 U.S. at 702.

The resolution of grievances through agreed upon contract procedures, as we have discussed, is at the heart of those "consensual processes." Moreover, an individual covered by a contractual grievance resolution system is not entitled to substitute a § 301 suit for that system unless he can demonstrate a breach by the union, not of some duty undertaken as a matter of contract, but of the representation duty implied from the NLRA and enforceable in whole or in part through that Act's administrative procedures.

Thus, at the threshold, the nature of this lawsuit is shaped by NLRA principles designed to serve the goals of a functioning collective bargaining system and bears no

---

[3] In *Syres,* the complaint alleged jurisdiction under 28 U.S.C. § 1331, but both the district court and the court of appeals found jurisdiction lacking thereunder. 223 F.2d 739. The petition for writ of certiorari in *Syres* (No. 390, October Term, 1955) stated that "the primary question to be decided is a procedural matter as to the jurisdiction of the Federal District Courts under 28 U.S.C. 1331" (p. 8). The Court's summary reversal citing, *inter alia Tunstall,* establishes that jurisdiction was found either on that section or on its companion provision, 28 U.S.C. § 1337, which is identical for present purposes except in waiving the jurisdictional amount, and which was relied on in *Tunstall.*

resemblance to a common law contract damage action designed to determine responsibility for, and to allocate the losses attendant on, a breach. That being so, two considerations mandate the use of the NLRA limitations period set forth in § 10(b).

First, Congress crafted § 10(b) as it did precisely to protect ongoing collective bargaining systems from delayed attack. As this Court put it in *Machinists Local* v. *Labor Board,* 362 U.S. 411, 425, underlying the six-month bar of § 10(b) is a Congressional purpose to foster "stability of bargaining relationships." That provision states Congress' adjustment of the individual employee interests safeguarded by the Act and the "interest in 'industrial peace which it is the overall purpose of the Act to secure' " (362 U.S. at 428, quoting *Labor Board* v. *Childs Co.,* 195 F.2d 617, 621-622 (2d Cir.)) (con. op. of L. Hand, J.)). In *Machinists,* of course, the charge by the employees ran against the formation of the agreement. In a case such as the one here the complaint is against the agreement's administration. But § 8(d) defines the collective bargaining required by the Act to include both the process of making an agreement and the "grievance procedure [which] is a part of the continuing collective bargaining process." See *supra* at 10-11.

The Act, as we have developed, favors "final" settlement of contract disputes as the preferred means to the end of stabilizing bargaining relationships and securing industrial peace. If such settlement could be challenged long after the fact, these purposes of a system of private "final adjustment" of grievances would be undermined. As the Court emphasized in rejecting the contention that the judiciary

is to review the merits of every arbitral construction of a contract:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> • • •
>
> [P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. [*Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596, 599.]

By the same token, if disappointed grievants are free to delay their challenges to final arbitral settlements, contrary to Congress' intent and the needs of the collective bargaining system, those settlements "will almost never be final." To be sure, the choice of where precisely the line should be drawn to accommodate these interests—the "repose" which Congress sought for the products of the collective bargaining process in order to serve "stability of bargaining relations" (*Machinists*, 362 U.S. at 425), as against "the vindication of [employees'] statutory rights" (*id.* at 429)—cannot be established as a matter of abstract reasoning. But in this instance Congress, "as the expositor of the national interest" (*id.* at 429), after weighing these competing factors, as decreed a six-month limitations period.

Second, the point just made becomes conclusive when it is remembered that the employee's duty of fair representation claim is implied from the NLRA not from § 301, and

court jurisdiction over that claim is provided by 28 U.S.C. § 1337 not by § 301. More precisely, some or all breaches of that duty constitute unfair labor practices under §§ 8(b)(1)(A) & (b)(2) of the NLRA. See *supra* at 13-19. At the least, there is no dispute that the representation duty and § 8(b)(2) coalesce when the impermissible conduct rests on consideration of union membership. To the extent breach of the representation duty is an unfair labor practice, the limitations period of § 10(b) is directly applicable.

Moreover, even if the duty extends to some acts that are not unfair labor practices, it remains true that the employee protections afforded both by *Steele* and its progeny and by §§ 8(b)(1)(A) & 8(b)(2) have a common genesis—the judgment that a system that grants exclusive authority to a statutory bargaining representative must safeguard the interests of affected individuals against abuse of that authority. The interest in being free from invidious union conduct is at the least then closely related to the interests protected in §§ 8(b)(1)(A) & (b)(2).

Thus, whether the representation duty is stated as an unfair labor practice or whether it is related to §§ 8(b)(1)(A) & (b)(2) in its general purpose and effect, § 10(b) is the proper source for determining when claims of breach of that duty must be raised. For that limitations period reflects Congress' judgment as to when claims of like or identical character must be brought. And, the anomaly of providing different periods for the same claim depending on the forum chosen or depending on the specific type of fair representation violation alleged would be entirely unjustified.[4]

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[4] There is no justification for attributing to Congress a reluctance to require suit filing, as distinguished from charge filing, within

5. *Hoosier* dealt with the question of the appropriate limitations period where Congress creates a federal claim enforceable in court but does not specify a federal limitations period. The question here is at several removes. The plaintiff's claim is based on an implied cause of action derived from legislation—the NLRA—that does contain an express limitations provision, albeit one addressed in terms solely to the administrative procedures Congress expressly provided for resolution of unfair labor practice charges. That Congress has failed to provide an express limitations period for a judicially enforceable cause of action that this Court found implied in the NLRA should not be equated with a Congressional failure to state a limitations period for an action expressly created by statute. It cannot reasonably be assumed in this regard, as it was in *Hoosier*, that Congress' silence reflects an intent to apply state statutes of limitations to these NLRA-based actions.

It remains true, of course, that one aspect of the instant case is predicated on § 301 of the LMRA: if the plaintiff can establish his NLRA breach of the duty of fair representation claim, he may then pursue his § 301 breach of contract claim. But here, unlike *Hoosier*, the latter is a direct challenge to the result reached in the contractual grievance resolution system. *Hoosier* itself recognized that:

> The need for uniformity, * * * is greatest where its absence would threaten the smooth functioning of those

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six months. Indeed, Congress has imposed upon employees a 90 day time limit for filing lawsuits in federal court under Title VII of the Civil Rights Act of 1964 (§ 706(f)(1), 42 U.S.C. § 2000e-5 (f)(1)), and a three-month time limit for individuals to sue to vacate arbitration awards under the United States Arbitration Act of 1925 (9 U.S.C. § 12). See, e.g., *Witt* v. *Reinholdt & Gardner*, 587 F.2d 383 (8th Cir.).

> consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and *the private settlement of disputes under it.* [383 U.S. at 702; emphasis added.]

The policy of promoting stability in collective bargaining which underlies the six-month limitations period in the NLRA is thus directly implicated by this aspect of plaintiff's case as well.

And, the contractual aspect of this proceeding cannot, in any event, be disentangled from the breach of duty aspect for purposes of determining the limitations period, because, as we have previously discussed, breach of the union's duty is a necessary predicate to pursuit of the contract claim. When the six-month period has passed with respect to the alleged union breach of its duty, that conduct becomes beyond challenge, and the precondition for maintaining the contract action cannot be met. As the Court held in *Machinists,* "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) [time limit]." 362 U.S. at 422.[5]

Finally, even were it appropriate to view the suit here as simply founded on § 301, the Court would not be obliged to apply a state statute of limitations. *Hoosier,* as we have seen, contemplated that "other § 301 suits different from the present one might call for the application of other rules on timeliness." *Supra* at 6-7. And, more generally, the Court has established that state limitations periods are not

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[5] Cf. *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558: "United was entitled to treat that past act as lawful after [the employee] failed to file a charge of discrimination within the 90 days then allowed by § 706(d) [of Title VII]."

to be applied when to do so would "frustrate or interfere with the implementation of national policies":

> When Congress has created a cause of action and has not specified the period of time within which it may be asserted, the Court has frequently inferred that Congress intended that a local time limitation should apply. * * *
>
> But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. * * * State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute. [*Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367. See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 104; *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462.]

In this instance Congress has devised a limitations period precisely attuned to the implementation of the national policies that inform § 301 and breach of duty suits. Thus, the court, to further those policies, should follow Congress' lead rather than that of the state legislatures.

That conclusion is buttressed by *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, where this Court addressed a different, but analogous, question. Congress, in the Death on the High Seas Act (DOHSA), had expressly created a cause of action for wrongful death on the high seas. This Court, in the exercise of its traditional admiralty jurisdiction, had also recognized "a federal remedy for wrongful

death * * * under general maritime law." *Id.* at 621. In *Mobil,* the Court discussed the extent to which it was free, in adjudicating claims for wrongful death on the high seas under the general maritime law, to ignore the choices Congress had expressly made in DOHSA:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to suppliment maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages * * * The Act does not address every issue of wrongful-death law, * * * but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.
>
> . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations * * * Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress . . ., but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute. [*Id.* at 625-626. See also *Public Arm'r of Cty* v. *Angela Compania,* 592 F.2d 58 (2nd Cir.).]

Although technically speaking the judicially cognizable cause of action for breach of the duty of fair representation is an implied cause of action to enforce a right implied from an Act of Congress (rather than, as in *Mobil,* a cause of action provided through an exercise of the judicial lawmaking power conferred by the Constitution), in substance

the situations presented in that case and this are quite similar. This Court is therefore not "free," in fashioning the rules governing this implied cause of action, to ignore "Congress' considered judgment on such issues as • • • the limitations period." *Mobil, supra.*

CONCLUSION

For the above stated reasons the decision below should be reversed with instructions to dismiss the complaint as untimely.

Respectfully submitted,

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No. 80-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,
Petitioner,

v.

WILLIAM MITCHELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The International Brotherhood of Teamsters (IBT) hereby moves for leave to file a brief as *amicus curiae* arguing that the decision of the United States Court of Appeals for the Second Circuit which this Court has agreed to review (49 U.S.L.W. 3264), was wrongly decided. William Mitchell, the Respondent, has denied his consent to the filing of said brief.

INTEREST OF THE IBT AND ISSUE TO BE COVERED IN ITS BRIEF AMICUS CURIAE

The IBT is an international union comprised of 752 affiliated local unions, including Teamsters Local 177, a defendant below and a respondent before this Court. The collective membership of the IBT's affiliates totals approximately 1.9 million working men and women. Some 80,000 to 100,000 different collective bargaining agreements cover Teamster-represented employees in this country. Consistent with recent trends in collective bargaining,[1] most of these agreements contain procedures for grievance resolution, including the arbitration of disputes over the meaning and application of agreements dealing with wages, hours and terms or conditions of employment.

As a spokesman for a large segment of organized labor, the IBT has a continuing interest in the development of a principled body of law regarding the arbitral enforcement of collective agreements and the obligation of representatives in regard thereto. In our view, the lower court's decision in this case contravenes federal policy favoring final and binding arbitration as a means of labor dispute resolution. It also conflicts with federal policy preferring a speedy resolution of labor disputes. We believe that it will aid the Court in its deliberation to have a succinct statement of why that is so. The function of the accompanying brief *amicus curiae* is to provide such a statement.

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[1] See, e.g., *Characteristics of Major Collective Bargaining Agreements, July 1, 1975*, BLS Bull. 1957, at 94 (1977) (less than 4% of 1,514 major agreements surveyed do not contain arbitration provisions).

CONCLUSION

For the above stated reasons, this motion for leave to file a brief of *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

This brief *amicus curiae* is filed by the International Brotherhood of Teamsters (IBT) contingent on the granting of the foregoing motion for leave to file a brief as *amicus curiae.*

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STATEMENT OF THE CASE

This employee action, brought against an employer and a union, seeks to relitigate a claim of wrongful discharge previously decided adversely to the employee by an arbitral panel convened pursuant to the collective bargaining agreement's grievance arbitration procedures.[1] Under that agreement, the arbitral decision was final and binding. But the suit alleges that, contrary to the arbitration decision, the discharge complained against was in violation of the contract, and that the union's failure to represent the employee fairly at the arbitration hearing contributed to the erroneous outcome. This action, filed under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, is one envisioned by *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976).

The sole issue presented here relates to the appropriate statute of limitations to be applied to a § 301 action alleging unfair representation which is filed after an arbitration decision has been rendered.

Characterizing this action as one to vacate an arbitral award, the district court applied New York's 90-day limitation on such suits (N.Y. CIV. PRAC. § 7511 (McKinney, 1963))[2] and dismissed the complaint filed more than 17 months after the arbitral decision had issued. Justifying its holding, the court noted that "[t]he policy favoring 'relatively rapid disposition of labor disputes' . . . combines in this case with the policy favoring arbitration as a means of securing a quick and final resolution of disputes in general." (Pet., at 3a)

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[1] The Employer is United Parcel Service, and the Union is Department Store and Wholesale Drivers, Warehousemen and Helpers, Local Union No. 177.

[2] Section 7511 provides: "An application to vacate or modify an award may be made by a party within 90 days after its delivery to him."

The United States Court of Appeals for the Second Circuit disagreed with the district court's characterization, although it acknowledged that the "'effect of a judgment for [the discharged employee] would be to nullify the arbitral decision'. . ." (Pet., at 12a). In reversing, it held that New York's six-year limitation on breach of contract actions (N.Y. CIV. PRAC. § 213(2) (McKinney, 1972)) was applicable. The court of appeals perceived no difference for statute of limitations purposes between § 301 actions where the grievance has not been taken to arbitration and those where an arbitration decision has been issued. In its view, "such a fractionalized approach to § 301 wrongful discharge actions" is not warranted.[3]

Accordingly, the court of appeals rejected the district court's reasoning that the federal policy favoring finality of arbitration awards dictated the application of a shorter limitation period in this type of § 301 action. Rather it believed that employees' rights *vis-a-vis* their employers and unions prevailed in this instance over the federal policy favoring arbitration, reasoning that a 90-day limitation would severely restrict those rights and unnecessarily add to the already stiff burden a plaintiff faces. Further, it held that a six-year period adequately furthers the federal goal of relatively rapid disposition of labor disputes, relying on *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1977).

We submit that the holding of the court of appeals misconstrues the decisions of this Court in *Hines* and *Hoosier Cardinal*, and contravenes established federal policy favoring final and binding arbitration and the speedy resolution of labor disputes. Moreover, it ignores the basic nature of this lawsuit.

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[3] The court relied on its previous decision in *Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971), wherein it held the six-year limitation applicable to § 301 breach of contract and unfair representation claims in a case where the union had not taken the grievance to arbitration.

SUMMARY OF ARGUMENT

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, contemplates suits by employees, as well as suits by and against employers and labor organizations. *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). An employee can maintain suit against his union for breach of the duty of fair representation, and against his employer for breach of contract, in one action. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976); *Vaca* v. *Sipes*, 386 U.S. 171 (1967). Because there is no federal statute of limitations governing § 301 actions, the timeliness of such suits is controlled, as a matter of federal law, by the most appropriate state statute of limitations. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1977).

In selecting the most appropriate state statute of limitations, a federal court must characterize the action, taking into account the elements of a *Hines* § 301 suit and applicable federal policies. State characterization principles, to the extent they conflict with important federal policies, must be disregarded. *UAW* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 706. *See also*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 465 (1975). Congress has declared as a paramount federal policy the promotion of industrial peace through the *quick* and *final* adjustment of labor disputes by arbitration. 29 U.S.C. § 173(d); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). Suits complaining of unfair representation in the arbitration process serve to safeguard individual interests. Yet, by lifting the bar of the collective bargaining agreement's finality provision, and by postponing the resolution of labor disputes, their maintenance is at odds with important federal policies favoring speedy and final arbitral resolutions. These competing interests must be accommodated by adoption of a cohesive limitations policy.

A fair representation action following an arbitral award is most closely analogous to an action to vacate the award. On this basis, New York's 90-day limitation is applicable to the instant action. N.Y. CIV. PRAC. § 7511. This result is supported, first, by a realistic appraisal of the object of the plaintiff's suit, and second, by a balancing of the relevant collective and individual interests involved here. Obviously, the plaintiff seeks to relitigate before the district court the same claim he lost in arbitration, namely the challenge to his discharge, and a judgment in his favor would be tantamount to vacating the arbitrator's decision. *Liotta* v. *National Forge Co.*, 105 L.R.R.M. 2636 (3d Cir. 1980). Furthermore, the central issue in this case is not the employer's alleged breach of contract, but whether the "final and binding" provision of the labor agreement's arbitration article is to be given conclusive effect. *Hines* v. *Anchor Motor Freight, supra*, 424 U.S. at 567, 569. This is but another way of asking whether the award should be vacated.

Borrowing New York's 90-day limitation applicable to suits to vacate arbitral awards for purposes of *Hines* § 301 fair representation cases better accommodates competing collective and individual interests than the State's extended six-year limitation for breach of contract actions. The former limitation promotes the use of arbitration by foreclosing seriously delayed challenges to arbitration awards. This is the purpose of N.Y. CIV. PRAC. § 7511, which is consistent with federal labor policy, and there is no apparent unfairness in limiting fair representation suits to the same 90-day period within which employers and unions are obligated to secure review or enforcement of arbitral awards.

On the other hand, the six-year limitation all but ignores Congress' preference for the speedy and final resolution of labor disputes. In this regard, the six-

year limitations period leaves questions of contract interpretation and administration uncertain for an unreasonable duration, thus tending to frustrate the smooth functioning of the collective bargaining system. An extended limitations period may also prejudice employee contractual rights, either by delaying the general application of arbitral interpretations until the limitations period has run, or by disrupting employee expectations that have long been settled through arbitration.

No manifest injustice results to employee rights from the choice of the 90-day limitations period prescribed by New York law. In both the National Labor Relations Act, 29 U.S.C. § 160(b), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), (f)(1), Congress opted for short limitations periods to encourage the prompt processing of unfair labor practice and employment discrimination charges. Measured against these analogous standards, it is apparent that *Hines* § 301 rights are not compromised by the characterization of this action as one to vacate an arbitral award. Ninety days from delivery of the arbitral award is an adequate time in which to file a § 301 suit, thus preserving *Hines* rights, but is not so unduly long as to jeopardize the stability of the collective bargaining process.

ARGUMENT

I. THE CHOICE OF THE MOST APPROPRIATE STATE STATUTE OF LIMITATIONS TO BE BORROWED FOR A § 301 FAIR REPRESENTATION ACTION IS A MATTER OF FEDERAL LAW.

A. "Characterization" Of The Action Is A Federal Law Question.

Because there is no federal statute of limitations governing § 301 breach of contract or fair representation actions, the timeliness of such suits is controlled, as a matter of federal law, by the most appropriate state statute of limitations. *UAW* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 704-05.[4] A federal court's first task in selecting the appropriate state limitations period is to characterize the lawsuit. "The characterization of this action . . . is ultimately a question of federal law." *UAW* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 706.[5] While the courts may in the first instance look to the state law characterization, that characterization should be rejected if it is "unreasonable or otherwise inconsistent with national labor policy." *UAW* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 706.

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[4] State statutes have frequently been held applicable to other federal causes of action where no limitations provision is stated in the federal act. See cases cited in *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 462 (1975). *But see, Occidental Life Insurance Co.* v. *EEOC,* 432 U.S. 355 366-372 (1977).

[5] In *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), the Supreme Court held that in § 301 suits courts must apply federal substantive law which should be fashioned by the courts in accordance with national labor policy. Although state law consistent with the purpose of § 301 may be used in formulating rules to be applied, the source of private rights is solely federal. 353 U.S. at 457. Also, incompatible doctrines of local law must give way to principles of federal labor law. *Tteamsters Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962).

More recently, this Court stated in *Johnson* v. *Railway Express Agency, supra*, 421 U.S. at 465:

> "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide. As the Court noted in *Auto Workers* v. *Hoosier Corp.* . . . considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." [6]

Then, in *Occidental Life Ins. Co.* v. *EEOC, supra*, 432 U.S. at 367, this Court held:

> "But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitation periods with national interests in mind, and it is the duty of the federal court to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." [7]

While the *Hoosier* Court did rely on state limitations provisions, rather than adopting a uniform § 301 limitations period, it further contemplated the application of federal law to subsidiary issues which arise in determining appropriate limitations periods.[8] As the Fifth

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[6] *See*, Note, *Filing of an Employment Discrimination Charge Under Title VII As Tolling the Statute of Limitations Applicable to a 1981 Action: The Unanswered Questions of Johnson* v. *REA*, 26 Case W. L. Rev. 889, 903-904 n.77 (1976).

[7] *See also*, Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decisions*, 105 U. of Pa. L. Rev. 797, 805 (1957).

[8] One commentator has stated that federal courts are "well situated to write federal law" on such subsidiary issues. 53 Colum. L. Rev. 68, 72 (1953).

Circuit has held: "federal courts borrow only the chronometric aspects and not the procedural or substantive nuances of the law of the forum." *Wolf* v. *Frank*, 477 F.2d 467, 475 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973). Manifestly, in characterizing the action for purposes of borrowing the most appropriate state statute of limitations, federal common law is controlling. State characterization principles may be applied only to the extent they are consistent with national labor policy.

B. Nature Of A § 301 Fair Representation Act And The Applicable Federal Policies.

The "characterization" process necessarily requires recognition of the elements of a fair representation action, in the context of each case's particular factual circumstances, and an understanding of the federal labor policies which inform the choice of a state limitations period. In *Hines* v. *Anchor Motor Freight*, *supra*, 424 U.S. 554, this Court viewed the case as one in which the bar of the collective bargaining agreement's provision for "final and binding" arbitration would be removed, if the integrity of the arbitral process had been seriously undermined by the union's breach of its fair representation duty. *Id.* at 567.

> "To prevail against either the company or the Union, petitioners must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. . . ." [*Id.* at 570.]

In so holding, the Court made clear that the bar of the finality provision is not to be lightly removed, since it "has sufficient force to surmount occasional instances of mistake." *Id.* at 571. Nor can the plaintiff in a *Hines* case prevail by simply "demonstrating mere errors in judgment"; dishonest, bad faith or discriminatory union conduct must be shown. Otherwise, even if

the arbitrator has erred, the contract's finality provision is to be enforced. It is apparent, therefore, that a fair representation action is in the nature of an exception to the ordinary rule mandating the speedy and final disposition of labor disputes through arbitration. Ultimately, it serves as a safeguard for individual, as opposed to collective, interests should operation of the contractual machinery fall below a minimum level of integrity.

Thus perceived, the fair representation action is within the framework of the national labor policy, and it must be harmonized with other, equally important labor objectives. Of these competing policies, none is more important than the congressionally declared policy of promoting industrial peace through the quick and final adjustment of labor disputes by a method agreed upon by the parties.[9] As repeatedly recognized by this Court,[10] grievance arbitration is the key to realization of that policy. Arbitral interpretations of the collective bargaining agreement furnish a body of private law—"the law of the shop"—which guides the parties in their continuing relationships. In this sense, then, arbitration lies at the heart of the system of industrial self-government created by collective bargaining. But the goal of peaceful dispute settlement will be actualized only if all those concerned—employer, union, and employee—are assured

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[9] Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d) provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

[10] *See, United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Hines* v. *Anchor Motor Freight, supra*, 424 U.S. at 562-63.

that arbitrators' rulings once rendered are truly final and binding.[11]

A further goal of national labor policy, as this Court has announced, is the "relatively rapid disposition of labor disputes." *UAW* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 707. Speed, like finality, is among the important federal interests advanced by private dispute settlement mechanisms. Both of these interests advance the collective objectives of all bargaining unit employees. Yet, they are necessarily at odds with the right of an individual employee to secure a judicial redetermination of his or her "shop" rights in those exceptional situations where arbitration proceedings are tainted by breach of the duty of fair representation. To state that important collective interests collide with individual interests at this juncture, however, is simply to recognize the problem. The critical question is how these competing interests are to be accommodated. We submit that accommodation can best be achieved in *Hines* § 301 cases by adoption of state limitations periods applicable to actions to vacate arbitral awards.

II. A FAIR REPRESENTATION ACTION FOLLOWING AN ARBITRAL AWARD IS MOST CLOSELY ANALOGOUS TO AN ACTION TO VACATE THE AWARD.

The court below erroneously held that categorizing this action as one to vacate an arbitral award was precluded by New York state law under which an employee has no standing to file such a lawsuit. This conclusion improperly incorporates state standing principles into a

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[11] In accordance with the preference for arbitration, this Court has established a policy of judicial deference to arbitrator's awards, viewing the arbitrator as better equipped than a judge to adjust labor management difficulties. *United Steelworkers* v. *Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582. Thus, judicial review of arbitral decisions is quite limited

§ 301 action. Clearly § 301, as interpreted by this Court, furnishes the requisite standing for an employee to sue.[12] The only gap in § 301 is the omission of a time limit for the filing of suit. Accordingly, as noted above, all that need be borrowed from New York law is the "chronometric aspect" of the state statute of limitations and not all of the subsidiary nuances of that law.

The characterization of fair representation actions where there has been no arbitration has divided the Circuits. Some courts have identified them as breach of contract actions, while others have viewed them as tort actions. *See, e.g., Butler* v. *Local 823, IBT*, 514 F.2d 442, 447 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975); 44 Geo. Wash. L. Rev. 418 (1976). Those courts which have adopted the breach of contract label have often done so because of the close relationship between the breach of contract claim against the employer and the unfair representation claim against the union, together with the convincing need for parallel limitations. That is the approach of the Second Circuit Court of Appeals. *See, Abrams* v. *Carrier Corp., supra*, 434 F.2d at 1251-53. However cases where there has been no arbitration have been characterized, we submit that a different rule is warranted where a "final and binding" arbitration award has been rendered.

The § 301 suit in *Hoosier Cardinal*, which did not involve an arbitration or a fair representation claim, was categorized by the Court, in conformity with state law, as one for breach of an oral contract. Nonetheless, the Court acknowledged the existence of a variety of § 301 actions:

> "Whether other § 301 suits different from the present one might call for the application of other rules

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[12] *Hines* v. *Anchor Motor Freight, supra*, 424 U.S. 554; *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).

> on timeliness we are not required to decide and we indicate no view whatsoever on that question." [*Id.* at 704 n.7.]

Thus, contrary to the court below, the Supreme Court clearly envisioned a "fractionalized approach" to determine timeliness in § 301 actions, dependent on the precise character of the particular action. Accordingly, application of different statutes of limitations in unfair representation actions, depending on whether there has been an arbitration award, is reasonable.[13]

In our view, this action is most appropriately characterized under federal law as one to vacate an arbitral award; N.Y. CIV PRAC. § 7511's 90-day limitation should thus apply. This result seems obvious. *Liotta* v. *National Forge Co.*, 105 L.R.R.M. 2636 (3d Cir. 1980).[14] The plaintiff is seeking to relitigate before the district court the same claim he lost before the arbitral panel, namely the challenge to his discharge. Dissatisfied with the result of the arbitration, he seeks to upset the arbitrator's decision. Indeed, the Court below conceded that a judgment in the plaintiff's favor would be tantamount to vacating the arbitration decision. Moreover, this characterization is conceptually sound. For were not this action viewed as one to vacate the award, plaintiff's success before the district court on his discharge claim

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[13] The courts have employed a "fractionalized approach" in other federal causes of action which rely on state limitations provisions, dependent on the nature of the relief sought. *See, e.g.*, "State Statutes of Limitations As Affecting Federal Civil Rights Actions Under 42 U.S.C. § 1981," 29 ALR Fed. 710 (1976).

[14] A significant number of district courts have adopted this characterization, including the district court in this case and in *Flowers* v. *Local 2602, United Steelworkers*, 105 L.R.R.M. 2299 (W.D.N.Y. 1979), *rev'd*, 105 L.R.R.M. 2304 (2d Cir. 1980), *petition for certiorari filed*, No. 80-26 (July 7, 1980). *See*, cases cited in Petition at 13 nn.8 and 9. *Contra, Smart* v. *Ellis Trucking Co.*, 580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

would subject the employer to two conflicting decisions: the award of the arbitrator upholding the discharge and the judgment of the district court invalidating the discharge.

Further, it is clear that under *Hines*, contrary to the court of appeals' conclusion, the gravamen of this § 301 action—indeed, its threshold issue—is whether an otherwise "final and binding" arbitral decision may be attacked because of the union's failure to represent the plaintiff fairly at the arbitration proceeding. Evidence sufficient to prove the union's breach of its duty must be submitted before the breach of contract claim against the employer may be entertained. Thus, the conclusion of the court of appeals that *Hines* requires that this suit be characterized as one for breach of contract is erroneous. For the central issue in this case, as framed by *Hines*, is not the employer's alleged breach of contract, but whether the "final and binding" provision of the collective bargaining agreement's arbitration article is to be given conclusive effect.[15] In other words, may the award be vacated?[16]

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[15] Similarly inaccurate is the conclusion of the lower court that this § 301 suit is procedurally distinct from an action to vacate an arbitral award since § 301 is independent of the grievance process. A *Hines* action is clearly not independent of the grievance process as it may be brought only if adequate grounds are proven for lifting the finality provisions of the contract. *See, e.g., Hines* v. *Anchor Motor Freight, Inc., supra*, 424 U.S. at 566; *Vaca* v. *Sipes, supra*, 386 U.S. at 186.

[16] In his dissent in *Hines, supra*, 424 U.S. at 576, Justice Rehnquist expressed the view that under the Uniform Arbitration Act, in use in many states, unfair representation was not one of the permissible grounds for vacating an arbitration award. The majority opinion, while obviously disagreeing with his belief that unfair representation was not a proper basis for vacating an award, nonetheless did not dispute his characterization of the lawsuit.

III. THE CHARACTERIZATION OF A FAIR REPRESENTATION SUIT IN DEROGATION OF A FINAL AND BINDING AWARD AS AN ACTION TO VACATE THE ARBITRATION AWARD COMPORTS WITH FEDERAL LABOR POLICY.

Borrowing New York's 90-day limitation applicable to suits to vacate arbitral awards for purposes of *Hines* § 301 fair representation cases better accommodates competing collective and individual interests than the State's extended six-year limitation for breach of contract actions. The former limitation promotes the use of arbitration by foreclosing seriously delayed challenges to arbitration awards. This is the purpose of N.Y. CIV. PRAC. § 7511, which is consistent with federal labor policy, and there is no apparent unfairness in limiting fair representation suits to the same 90-day period within which employers and unions are obligated to secure review or enforcement of arbitral awards. On the other hand, the six-year limitation all but ignores Congress' preference for the speedy and final resolution of labor disputes. Consequently, it detracts from the attractiveness, convenience and economy of arbitration as the preferred means of settling labor disputes.

The six-year limitations period leaves questions of contract interpretation and administration uncertain for an unreasonable duration. Arbitration decisions provide guidance as to the meaning of contract terms and aid the parties to the agreement in carrying out their contractual rights and duties. If the validity of those decisions is vulnerable to attack for six years, the parties may be hesitant to make broad changes in their operations or conduct to conform with the decision, for they cannot be sure that the award will survive as the "law of the shop." Moreover, since six years outlasts the duration of any collective bargaining agreement, negotiations for new agreements may be confused by doubt as

to the meaning of the old. In sum, characterization of this lawsuit as one for breach of contract would necessarily frustrate Congress' effort to promote the smooth functioning of the collective bargaining system.

Additionally, such a characterization would prejudice employees whose rights the arbitral awards concern. Grievances often affect not simply one employee, as in this case, but a large group. Decisions regarding, for example, seniority rights have potentially far-reaching consequences for a bargaining unit. The union and employer may decline to implement such decisions fully for fear that an unsatisfied employee will sometime in the future challenge the results. In consequence, some employees may suffer loss of benefits. Or if the decision is implemented, and then later held invalid, employee expectations will be significantly disrupted. Surely, the interests of all concerned are furthered by a quick arbitral resolution and the finality of arbitral awards. The complications which will arise in matters of contract interpretation, administration, and negotiations if a six-year limitation period is adopted serve to highlight the distinction between this case and one in which there has been no arbitral award. For these particular difficulties arise only when an award has been rendered.

Thus, while this Court in *Hoosier Cardinal*, *supra*, 383 U.S. at 707, approved the borrowing of a six-year statute of limitations as adequately furthering the goal of "relatively rapid disposition of labor disputes," that case was quite different from this one. There the Court was faced with a choice between a six-year and 20-year limitation. More importantly, the case was strictly one for breach of contract and involved no attempt to vacate an arbitral award. This distinction is crucial given federal policy favoring final and binding arbitral awards. Moreover, *Hoosier Cardinal* still reflects a "distinct preference for the shorter statute of limitations where the

question of characterization is a close one and no manifest injustice results from such a choice." [17]

No manifest injustice results to employees' rights from the choice of the 90-day period herein. Under the National Labor Relations Act, 29 U.S.C. § 160(b), the time limit for the filing of unfair labor practice charges is six months. Particularly since an alleged breach of the union's duty of fair representation may also be cognizable as an unfair labor practice,[18] the 90-day period cannot be viewed as unusually short.[19] Also, under Title VII of the Civil Rights Act of 1964, as amended in 1972, an employee must file unfair employment practice charges with the EEOC within 180 days of the discrimination complained against, or within 240 days of the discriminatory event if the charge is to be deferred to a state fair employment practice agency. After receipt of a right-to-sue letter from EEOC, the employee must file suit in district court within 90 days. 42 U.S.C. § 2000e-5(c), (e) and (f)(1). These time limits are strictly enforced. *IUE v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Mohasco* v. *Silver*, 65 L.Ed.2d 532 (1980).

As this Court noted in *Mohasco, supra*, 65 L.Ed.2d at 543, 548 (footnotes omitted):

> "time limitations are inevitably arbitrary to some extent; and the limitations at issue here are not so short that a plaintiff's remedy is effectively denied for all practical purposes without an opportunity for a hearing.
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[17] *See, e.g., De Arroyo* v. *Sindicato Trabajadores Packinghouse*, 425 F.2d 281, 287 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

[18] *See, e.g., Vaca* v. *Sipes, supra*, 386 U.S. 171; *Miranda Fuel Co.*, 140 N.L.R.B. 181, *enf. denied*, 326 F.2d 172 (2d Cir. 1963); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312, *enf'd.*, 368 F.2d 12 (5th Cir. 1966).

[19] Cf. *Falsetti* v. *UMW*, 355 F.2d 658, 662 (3d Cir. 1966).

> By choosing what are obviously short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination. . . ."

Certainly the public policy favoring equal employment opportunity is as fundamental as that favoring fair representation. If an employee has only 90 days after receipt of a right-to-sue letter to obtain counsel and file suit, then fairness requires no more in the instant case.

Hines rights are not compromised by the characterization of this § 301 action as one to vacate an arbitral award. That characterization best effectuates and balances the conflicting policy interests at stake. Ninety days from delivery of the arbitral award[20] is an adequate time in which to file a § 301 suit, thus preserving *Hines* rights, but is not so unduly long as to jeopardize the stability of the collective bargaining process. The arguable burden of prompt filing, which the 90-day limitation imposes, is consistent with the unique nature of fair representation actions. This Court did not intend to establish an alternate judicial forum for the enforcement of collective bargaining agreements in declaring an employee's right to seek redress from a union's unfair representation at an arbitration hearing. Instead, the cause of action was reserved for exceptional situations, and legitimate individual interests will not be harmed by requiring that it be asserted promptly.

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[20] Forty-two states have enacted special statutes of limitations governing actions to vacate arbitration awards. In 28 of these states, the prescribed time limit is 90 days.

Contrary to the statement of the Court below (Pet., 11a), the 90 days run from delivery of the award, not from the date of the employee's discharge.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed and the case remanded for entry of an order affirming the district court's grant of summary judgment dismissing the complaint as barred by the 90-day limitations period on actions seeking to vacate arbitral awards.

Respectfully submitted,

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